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SINCLAIR v. BROUGHAM.*

THE RIGHT HON. LORD WRIGHT.

THE case of *Sinclair v. Brougham*¹ has been generally regarded as an authority of first-rate importance. I think it has been properly so regarded, though my reasons for so thinking may not altogether agree with the reasons emphasized by some lawyers. I regard the case as primarily significant as embodying the leading principles on which the Court acts in exercising its equitable jurisdiction to give relief in order to prevent unjust enrichment, or to achieve restitution, if we accept the useful term which has been employed in the recently published American Restatement of the Law of Restitution. The word itself is only an echo of language which will be found in English judgments, indeed, in this very case of *Sinclair v. Brougham*. The case shows how the Court can do justice by applying equitable principles where the Common Law would have been powerless. But since every Court is now bound in the same proceeding to apply either law or equity or both as the circumstances may require, the distinction between law and equity is now only important in the sense that the differences of method and rules must be observed. In the case we are considering a company had borrowed money for purposes for which it was *ultra vires* for it to borrow. There could in law be no claim for money lent and no claim in law for the repayment on the ground of quasi-contract or, to use the now obsolete

* An address to the Cambridge University Law Society, November 26, 1937.

¹ [1914] A. C. 398.

phrase, contract 'implied in law', because to allow such a claim as a merely money claim would be to sanction an evasion of the public policy forbidding *ultra vires* borrowing by companies. Further, as the money lent or its products could not be identified in the company's possessions, a claim in law could not be maintained. But the powers of the Court were not exhausted. The problem was further complicated by the conflicting claims of the shareholders. The moneys lent had become inextricably mingled with other moneys in the course of myriad transactions. The Court solved the difficulty by a sort of rough justice, in the form of a tracing order, so as (in the words of Lord Dunedin, at p. 437) 'to give full effect to the doctrine of *ultra vires*—for the person receiving is not ordered to pay as a debt the equivalent of what he originally got, but ordered merely to surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without'. As I read the judgments, if the money borrowed had been either in the original form or its products, still capable of identification, the claim would have been properly brought as a claim in law. The aid of equitable principles had to be invoked because the identification had become impossible. It might also have been necessary to invoke the aid of equity on account of the company's insolvency to give the claimant the benefit of an equitable charge on the identifiable property or its products in the company's possession. The importance of the case is that it demonstrates a category of claims distinct from contract, or tort, or trust (express or resulting), the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. Emphasis is to be placed on the word 'unjustly'. There are many positions in which a defendant may be enriched at the expense of the plaintiff and yet it may not be unjust for him to retain that benefit. It is, therefore, important not merely to recognize the existence of this separate head in the law (in which word I include law and equity), but to enumerate, to classify and to distinguish as the American Restatement of Restitution has sought to do, the different positions which may arise, bringing into one conspectus both legal and equitable rights and remedies. The fundamental principle may also be stated in the words of Lord Parker (at p. 444), which are capable of being applied beyond the special facts of the case he was dealing with. 'The equity lay in this that it would be unconscionable for the society to retain the

amount by which its assets had been increased by and in fact still represented the borrowed money.' This language may be compared with Baron Parke's expression in *Kelly v. Solari* (1841) 9 M. & W. 54 when speaking merely as a common lawyer of the right to recover money paid by mistake 'it is against conscience to retain it' (at p. 58), which is explained by Lord Sumner as depending on the fact that the payer had no intention in such a case to enrich the payee. Whether the remedy given is legal or equitable or both, the underlying principle is the same. In this particular case, Lord Parker points out at the outset that it was already settled law that an *ultra vires* borrowing by a society does not give rise to indebtedness either at law or equity on the part of the society. But that forms merely the starting point for the inquiry how justice may be done and unjust enrichment prevented. Incidentally that may be, as it was in this case, a very different thing, when looked at from the plaintiff's point of view, from complete restoration to him. The governing consideration is the superfluity in the defendant, which may differ from the expense to the plaintiff.

The facts of *Sinclair v. Brougham* were simple. The Birkbeck Building Society had no power to carry on a banking business. It did so, along with its legitimate business as a building society, and accepted large sums from depositors for the banking business. Thus there was borrowing which was *ultra vires*. Heavy losses were incurred and the society went into liquidation. Its assets were insufficient to meet the claims of the outside creditors, and to repay the shareholders and the depositors. It was conceded that the outside creditors came first. As to the depositors, as I have already said, their Lordships held they could not on the facts of the case claim to rank in law or equity as ordinary creditors. A conflict of claims arose as between shareholders and depositors. One possible view was that the shareholders were entitled in the liquidation to share in all the assets remaining after outside claims enforceable at law were paid, which would have given them five times the amounts of their subscriptions. But the assets beyond question represented in some part the sums which had been paid to the society by the depositors. These were many times larger in total amount than the share capital paid up by the shareholders. The House of Lords held that it would be unconscionable that the shareholders should be enriched at the expense of the depositors. As all the funds had been inextricably mingled together in the actual transactions of the society, it was impossible to identify in the assets found on liquidation in the society's possession what

represented contributions which had come from the shareholders and what represented sums paid by depositors. Neither shareholders nor depositors could claim priority, as both sets of persons must equally be deemed to have been cognisant that the funds were being utilized to carry on the *ultra vires* business. It was held that justice could best be done by a rough sort of tracing order, which took the form of dividing up the assets which remained after paying outside creditors and preferred shareholders among all the claimants, shareholders and depositors, *pari passu*, in the proportions of the sums which they had severally contributed. If the net assets had been sufficient to repay all these claimants, the matter would have been simple. But there had been a loss. That loss, it was held, should be borne equally by those whose equities *inter se* were equal. The House of Lords reversed the Court of Appeal, who by a majority, Fletcher Moulton L.J. dissenting, had held that the shareholders were entitled to repayment in full. The decision of the Court of Appeal was clearly illogical, though apparently based on authority binding that Court. Logically the shareholders if entitled to priority would have been entitled to divide up all the remaining assets of the society. Fletcher Moulton L.J. held that the depositors were entitled to priority over the shareholders. The House of Lords, while agreeing with his reasoning up to a point, held that there was no ground for giving priority to depositors over shareholders, or shareholders over depositors.

There were four speeches delivered in the case in the House of Lords, two by equity lawyers, Lord Haldane (with whom Lord Atkinson agreed) and Lord Parker, one by Lord Dunedin, one by Lord Sumner. I shall deal first with the constructive portions of these judgments, in which the conclusion arrived at is justified. I shall later refer to the negative or critical portions, in which they deal with the matter, for them already a *chose jugée*, viz. that in the facts of the case there was not a debt either at law or in equity.

Of the four speeches, I have found those of Lord Parker and Lord Dunedin most illuminating. I shall primarily examine their reasoning, adding at times parallelisms from their colleagues, though the reasoning of all the Lords agrees in substance. I find in the speeches of Lord Parker and Lord Dunedin references more or less complete to almost every main principle of unjust enrichment or restitution, which latter term is actually used by Lord Dunedin. The most obvious and common claim in a case of unjust enrichment is in debt, but that is put aside as inapplicable in the facts of the case. I shall reserve that

aspect for discussion later. But I may here observe that an action at law is recognized by the Lords to be competent even in cases of *ultra vires* loans, so long as the money lent or its products are identifiable. This is based on the doctrine of *Taylor v. Plumer* (1815) 3 M. & S. 562, an aspect which is more fully dealt with by Lord Haldane. When, however, identification ceases to be possible at law, then equity can still carry the matter further, for instance, it can apply the principle of *Hallett's Case* (1880) 13 Ch. D. 696. In thus proceeding equity imposes what has been usefully called a constructive trust, to distinguish it from an express or resulting trust. In an express or resulting trust there is an actual intention of the settlor to create a trust, the intention being either expressed or to be inferred from the facts of the case. Cases of that character where the trust depends on the intention of the settlor to create it are distinguishable from these trusts or rather quasi-trusts which are imposed by the Court in order to prevent unjust enrichment, and which are called constructive trusts because they do not arise from the intention of a settlor, but are declared by the Court *ab extra*, irrespective of actual intention. But there are cases in which equity cannot find a constructive trust of the property, because that property represents in part only the property which is the subject of the unjust enrichment. It is the product not of that property by itself, but of that property combined with the defendant's own property or with that of a third person. Equity in such cases gives a partial right, which has been called an equitable lien, on the total property to the extent that the total property represents the plaintiff's property. Lord Parker in one passage speaks of all these rights as being themselves a species of property which equity has created. In such cases there cannot in general be equitable property unless there is legal property in the defendant, only the equitable property being in the plaintiff, whereas in the *Taylor v. Plumer* type of case, the legal property remains in the plaintiff. When the property has passed in law to the defendant, the plaintiff can only claim as beneficial owner in equity of the property, claiming either on the ground of a constructive trust when the whole property is the product of the plaintiff's property, or on the ground of an equitable lien when the property is only in part the product of the plaintiff's property. The extent to which the Court may carry this equity is strikingly illustrated by the tracing order in *Sinclair v. Brougham*, where the properties of two sets of claimants had, as already stated, become inextricably mingled as the result of an immense number of separate transactions over many years, so

that only the roughest apportionment of the residual property could be attempted. But in effect each individual claimant was given an equitable lien in his proper proportion. Lord Sumner seeks to illustrate what was done by the analogy of a familiar case at Common Law where material chattels, bales of cotton, belonging to different owners, had become mixed up in a ship's hold as the result of a maritime casualty, and had become incapable of identification because the marks indicating ownership had become obliterated. The Court held in that case that the several shippers or consignees were tenants in common of the indiscriminate bulk. It is a similar principle which equity applies in the more esoteric atmosphere of financial transactions. But the point here to be noted is that equity does not stop where law must do. It will follow the plaintiff's property up to the ultimate limit of its identification in any form or in any amalgam, even into the hands of third persons, so long as they are not purchasers for value without notice, and even as against persons who have no higher title in equity than the original transferee, such as his ordinary creditors or his trustee in bankruptcy. I may here note the third or alternative form of relief which may in proper cases be given, that is, where a person's money has been used to discharge the obligations of the recipient, but where the person can have no direct recovery as for a debt. An illustration of such a case is where money has been borrowed *ultra vires*. This third method is also noted by the Lords in *Sinclair v. Brougham*, and is described as subrogation. The *ultra vires* lender (if he may be so called) is put to stand in the shoes of the borrower's creditor, at least as regards the personal debt. In that way, it is said, the *ultra vires* borrower's total indebtedness is not increased, but unjust enrichment is at least in part obviated. Lord Parker put another case somewhat analogous, namely, where money borrowed to the lender's knowledge for an illegitimate purpose has been in fact used for a legitimate purpose in whole, or in part, and he indicates his view that such money would be recoverable as a debt though the borrowing was *ultra vires*. It was strongly urged in *Sinclair v. Brougham* that in the facts of that case subrogation was the utmost and only remedy that equity could give. It would have assuredly been futile since in the inextricable flood of transactions no depositor could have shown that his money had been used to pay any particular debt of the society. But no such limitation on the powers of the Court in equity was admitted. Lord Dunedin is particularly instructive on this aspect. After adducing parallels from Roman law and from Pothier, he went on to say (at

p. 435): 'I have made these citations to show that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract. Is English equity to retire defeated from the task which other systems of equity have conquered? Let us for a moment examine what the argument on the other side is. There being no contract, it is impossible, it is said, to have any obligation on the part of the society to restore what it has taken from the depositors. The only right of the depositors is a right to vindicate property, or, in other words, when you have a *ius in re* you can enforce it; but if the thing has so disappeared that a *ius in re* is no longer to be found (and this must practically always be so in the case of money), then your remedy is gone. The sole relief which equity can give is that if you can show that your money has paid a just debt, in that case you shall have action. This comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban. In the words of technical equity it is unconscionable.' A little later (at p. 436) he proceeds: 'But further, the whole strength of this argument lies in the idea that the *ius in re* represents the depositors' only right: that there can be no obligation on the other side at all. It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a *ius in re*, for you cannot have a *ius in re* in currency. It shows that both an action founded on a *ius in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.' This statement is, I think, in full accord in substance, though the line of approach may be somewhat different, with what Lord Parker enunciated. I may also quote a brief passage in which Lord Dunedin stated the practical result of *Sinclair v. Brougham*. 'The position therefore comes to this. The shareholders are entitled to share among them the proper assets of the society. But they are not entitled to be made rich at the expense of the depositors, by swelling the assets of the society by means of the proceeds of moneys which they themselves never contributed. There is a mixed mass of assets as to the precise composition of which as to source it is impossible to pronounce. Had the assets never shrunk there

would be enough to pay both in full. But they have shrunk, and someone must bear the loss.' He finally concluded that the only equitable means was to let each party bear the shrinkage proportionately to the amount originally contributed.

I do not pretend by these brief excerpts to produce the full richness of the reasoning of the Lords in the constructive aspects of their judgments. This elaboration which has explained or indicated the full positive reach of the doctrine of unjust enrichment was rendered necessary by the negative circumstance that there neither was nor could be a contract to repay the sums deposited. The essence of the remedy was not compensation to the plaintiff, but the restitution by the defendant of what would be, if not restored, an unjust enrichment. Lord Haldane puts the remedy of law as being based on the fact that no property in the money had passed. A similar view was in a later case (*Jones v. Waring & Gillow* [1926] A. C. 670) suggested in regard to the recovery of money paid under mistake by Lord Sumner. Lord Haldane said (at p. 420): '[The common law] looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me to be, on ground of principle, as true of money paid under mistake of fact or on an *ultra vires* contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee.'

'But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrongdoer into his account with his banker, who simply owed him a debt, so that no money was, or could be, in the contemplation of a Court of law, earmarked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy.'

This way of looking at the matter which is reflected in the other speeches, particularly that of Lord Dunedin, eliminates any reference to contract, express, implied in fact, or implied in law, and puts the position simply on what Lord Dunedin calls 'superfluity', the traceable possession in the defendant of the plaintiff's property or its products. In other words, simply unjust enrichment. On this basis the concept of debt, though convenient in practice, becomes logically otiose. The property concept obviously would apply to the great mass of cases of restitution, but would not cover that important category of

cases where a defendant is enriched (or advantaged) because the plaintiff under legal compulsion has paid in money or chattels or other property a debt, or has discharged a liability, which is properly the debt or liability of the defendant. The defendant has thus been enriched because his liabilities have been decreased and it would be unjust that the burden should be left on the plaintiff. There must be restitution. Analogous principles apply in other types of cases. But it is not easy to apply to such circumstances the rubric of a right of property as in cases of *ultra vires* borrowing or money paid by mistake or under duress. It may, however, be that all cases fall under the higher equity enunciated by Lord Dunedin, that no person has a right to keep either property or the proceeds of property which do not belong to him. The man who has obtained the release of his liability by means of another's property, cannot keep the proceeds of that property, the release from liability, without making restitution. However, in *Sinclair v. Brougham*, the Lords were not, it seems, thinking of these particular questions.

This line of reasoning seems to assimilate cases of *ultra vires* borrowing to other cases of restitution, such as money paid by mistake and so on. In one aspect that may be true. But there may be a further aspect peculiar to *ultra vires* borrowings. The directors of the society who receive the money do not in strict law receive it as agents of the society, because the society cannot in law borrow the money. If in fact it goes into the coffers or funds of the society and can be identified there, it is even more manifestly that if it were money paid by mistake, not the society's but the lender's money. Lord Parker, touching on this aspect of the case, puts the case of such money being used to carry on the *ultra vires* business. If, he says, the business is a success, the society could not be entitled to anything except the profits, or surplus; it could not be entitled to the assets and exempt from the liabilities on the plea of *ultra vires*, and for that purpose the borrowed money would be a liability of the business. This would seem to recognize a right in such circumstances to a money claim in law, as for borrowed money, though the money was borrowed *ultra vires*. In truth, a money claim, whether based in property, or in debt, comes in all these cases to the same thing. But there is, I think, in the case of moneys borrowed *ultra vires* an important distinction which emerges in Lord Parker's judgment and elsewhere in the case. The *ultra vires* lender can only recover *in forma specifica* if he can show that the borrowed money is actually in the possession of the borrowing

society, that is, that the society is enriched. If the directors acting *ultra vires* have disposed of the borrowed money in any way, it may truly be said that it has never reached the society. The mere borrowing is not the act of the society and apart from remedies in the way of subrogation, the only cause of action either in law or equity, in respect of the borrowed moneys is by showing that at the date of claim they are *in specie* or in the form of traceable products in the society's possession. So to hold is not to evade the doctrine of *ultra vires* or to legitimize *ultra vires* borrowing. Lord Parker's view in this context is, I think clear, from the passage I have already cited. In the normal cases, it is the original reception of the money (to quote again Lord Dunedin's phrase) which carries the liability of restitution. But that idea is *simpliciter* inapplicable to *ultra vires* borrowing. The society is merely ordered 'to surrender what he still has as a superfluity'. Lord Parker is careful to point out that the receipt of money in the course of a transaction which is in its general character *ultra vires*, as contrasted with the special case of *ultra vires* borrowing, may, and I gather in his opinion generally does, give rise to a debt at law. For this he cites *Scott's Case* (1884) 9 App. Cas. 523. This case, he thinks, is sufficiently explained as depending on failure of consideration, which seems to me to be a typical case of unjust enrichment. In a case of that type the society does actually receive the money, so that the liability can be put on the original reception. The Lords differed from the admirable dissenting judgment of Fletcher Moulton L.J., which well repays study, simply on the ground that he did not recognize this particular and vital distinction, which illustrates the true nature of the doctrine of unjust enrichment. All this makes it abundantly clear that unjust enrichment has no relation as a juristic conception with contract at all. Now it is pertinent to observe that at one time during last century it was said that there were only two classes of action known to the common law, contract and tort. This classification is no doubt retained for certain statutory purposes, for instance this classification is found in the County Courts Act in regard to questions of costs, and leads to frequent difficulties. But the dichotomy does not correspond to any juristic classification, and is of no significance for common law decisions. It has been recognized by distinguished writers, as, for instance, Pollock, that quasi-contract is a separate head from contract. From this it follows that even if the term 'contract implied by law' is retained as meaning quasi-contract, and if the equitable rights and remedies are ignored, still 'contracts

implied by law' signify a third head apart from contract and tort. The specific character of restitution as a legal category may be disguised but cannot be destroyed by confusing and inappropriate terminology. But clear as this might appear, even from a mere reading of *Sinclair v. Brougham*, certain parts of, or observations in, the judgments have been taken in some quarters to deny the existence of any such body of principles, whether described as quasi-contract or restitution. It is necessary to examine this aspect of the judgments, because there has been a tendency to sterilize or petrify this branch of English law and equity, with the result that even to-day there is in England no separate or systematic treatise on this most important branch of law and equity, which is recognized as such in most, if not all, civilized laws.

The trouble has arisen because the Lords, as I think, unnecessarily, reverted to legal antiquarianism in order to explain why an *ultra vires* borrowing did not give rise to any indebtedness in law or equity. The explanation was unnecessary because, as Lord Parker pointed out, the proposition had been already settled by the cases he cites, two of which were in the House of Lords. It was unnecessary to go further, and new and separate reasoning would be merely matter of *obiter dictum*. But all four Lords do refer to the old form of action for money had and received as based upon an implied promise to repay, which would be a promise which the society could not lawfully make. Lord Sumner puts the matter broadly (at p. 452). 'The depositors' case has been put first of all as consisting in a right enforceable in a common law action. It is said that they paid their money under a mistake of fact, or for a consideration that has wholly failed, or that it has been had and received by the society to their use. My Lords, in my opinion no such action could succeed. To hold otherwise would be indirectly to sanction an *ultra vires* borrowing. All these causes of action are common species of the genus *assumpsit*. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot *de iure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid.'

Lord Dunedin says (at pp. 433-434): 'I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of the common law action is to handle *periculosae plenum opus aleae*. But to the best of my comprehension and notwithstanding the case of *Phoenix Life Assurance Co.* (1862) 2 J. & H. 441, I have come to the con-

clusion that the action for money had and received cannot be stretched to meet the situation. It is not, however, necessary that the claim should be one capable of being made good by an action at law. It will suffice if there is an equitable remedy.' He then proceeds to discuss the principles of unjust enrichment. He concludes that the doctrine of *ultra vires* was introduced in order to let societies keep their own, not to appropriate other people's money. For him, it seems, the introduction of argument on the old forms of action (which he seems to approach with some distaste) does not carry the matter very far.

Lord Haldane is much more thoroughgoing as regards the forms of action. He says that actions arising *quasi ex contractu* are actions based on a contract which is imputed to the defendant by a fiction of law. 'The fiction can only be set up with effect if such a contract would be valid if it really existed' (at p. 415). He proceeds to an historical disquisition, terminating with a passage from Ames' well-known lecture on the history of *assumpsit*, in which that distinguished professor ends by saying that *assumpsit* competed with equity in the case of the essentially equitable quasi-contract growing out of the principle of unjust enrichment' (p. 417), which certainly seems to indicate a development far beyond any original idea of *assumpsit*. Lord Haldane concluded that the depositors' claim cannot be *in personam* and must be *in rem* to recover property with which in equity at all events they have never really parted. He puts the claim therefore on property.

I cannot help regretting the importance which has thus been ascribed to the old forms of action. I have already shown that the doctrine of *ultra vires* does make a real difference in any claim for unjust enrichment. That was settled by the House of Lords long before *Sinclair v. Brougham*. Why plunge into this unnecessary discussion, which seems to me to be rather a debating point than the exposition of any juristic conception? It is true that while the forms of action existed the appropriate form applicable to a claim for money had and received or quasi-contract was, since about 1700, the *indebitatus assumpsit*. So that what is said about the fiction of a notional contract or a contract implied in law is true enough so far as it goes. But a disquisition on legal history does not as such constitute a *chose jugée*. It may in fact form the ground of an actual decision, which as we know is a *chose jugée* though based on or explained by wrong legal history, as, for instance, in *Beamish v. Beamish* (1861) 9 H. L. C. 274. But it is the decision which is the precedent. Here no decision was based on the Lords' views about legal

history or about the old forms of action. It was already settled that in such a case as that before them the legal claim did not lie. The importance of the substantial and affirmative decision and of the actual discussion in the judgments lies in the exposition of the equity of restitution. But Lord Parker, for instance, pointed out that an action at law would lie in respect of money paid under an *ultra vires* borrowing if the claim were made before the money or its products had ceased to be capable of identification, and could be brought if the money lent is used for the legitimate purposes of the society. I am not sure whether in such cases he meant that such an action would lie (if old forms are to be regarded at all) as for money had and received. Lord Dunedin says that the action for money had and received 'cannot be founded on a *ius in re*, for you cannot have a *ius in re* in currency. It shows that both an action founded on a *ius in re*, such as an action to get back a specific chattel, and an action for money had and received are just different modes of working out the higher equity that no one has the right to keep either property or the proceeds of property which does not belong to him' (at p. 436). The fictional contract, after there has been a certain lip service accorded to it, seems to be vanishing more and more, indeed, even the ghost of the form seems to have disappeared. The peculiar rules which apply to the claim in respect of *ultra vires* borrowing are not determined in any sense by reference to the fictional contract. Indeed, I repeat, contract has nothing to do with the matter.

But there seem to me to be many reasons why references to the fictional contract should now be eliminated even on grounds of history. The fiction of the contract implied in law was adopted for procedural reasons of convenience which were quite sufficient while the old forms of action continued. The old common lawyers were a robust people, and if a fiction was convenient under the old rigid forms of pleading they did not worry about its correspondence to reality or to juristic concepts. But it does not follow that they did not realize the true nature of the concept.

Before the Common Law Procedure Act, 1852, and the Judicature Act, judges naturally refer to the contract implied in law, because the convenience of the writ of *indebitatus assumpsit* outweighed the logical absurdity which Holt C.J. emphasized when he said it was a metaphysical idea, because the Court could not make a contract for the parties, but contract depended on the will or consent of the parties (*Starke v. Cheeseman* (1699) 1 Ld. Raym. 538). Lord Mansfield about sixty years

later in a passage in *Moses v. Macferlan* (2 Burr. 1005, 1008), often quoted and often unfairly criticized, uses the term debt implied by law, which is more accurate and accords with *Slade's Case* (1604) 4 Rep. 92 *b*, according to which the fictitious *assumpsit* is implied from the debt. Even since the two Acts of reform, judges speak of the contract implied in law. But when judges are defining the characteristics of the claim, as contrasted with the procedural form, they drop a reference to the idea of notional contract and state the liability in objective terms. For instance, Lord Tenterden C.J., in *Pownal v. Ferrand* (1827) 6 B. & C. 439, said, in regard to a claim for money paid under compulsion of law to the defendant's use: 'I am of opinion that he is entitled to recover upon this general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter' (at p. 433). My comment is not affected by the fact that his two colleagues spoke of a contract being implied by law. Again Parke B., the greatest of the classical common lawyers, in his famous statement of the law (in *Kelly v. Solari* (1841) 9 M. & W. at pp. 58—59) as to money paid by mistake does not mention the notional contract: the substantial ground and the only substantial ground is that 'it is against conscience to retain it'. As I shall show later this is accepted as the ground by Lord Sumner in a case nearly a century later. Parke B. goes on to add that a demand may be necessary in these cases where the party receiving may have been ignorant of the mistake. Some have found in this observation a veiled reference to contract as the idea underlying the cause of action. I cannot see the force of this. What I think is meant is that as the receipt of the money is innocent, the recipient should not be vexed by an action until he has had notice so as to have the opportunity of making repayment: it is the retention, not the receipt, which is the wrong. But even this qualification of the cause of action was not accepted by Hamilton J. in *Baker v. Courage & Co.* [1910] 1 K. B. 57, at p. 65. He held that notice of the mistake which was common to both parties was not necessary to complete the cause of action, which was complete independently of any notification of the discovery of the mistake.

Lord Tenterden's statement of the law was repeated by Cockburn C.J. in 1872 in *Moule v. Garrett*, L. R. 7 Ex. 101, at p. 104.

I do not intend any complete citation, and pass now to 1890, to *Re Rhodes* (1890) 44 Ch. D. 94, where the claim was for necessities supplied to a lunatic. It had been said that the party

supplying became a creditor by implied contract. Cotton L.J. said (at p. 105) that the term implied contract was a most unfortunate expression because there cannot be a contract by a lunatic. 'It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities.' Lindley L.J. (at p. 107) says the doubt as to the lunatic's liability 'has arisen from the unfortunate terminology of our law'. The term implied contract, he said, had been used to denote 'not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu*'. This case does not seem to have been cited in *Sinclair v. Brougham*, but its principle has received the sanction of the Legislature, so far as relates to goods which are necessities, in the Sale of Goods Act, 1893, s. 2, where it is in terms said that the liability is not affected by reason that the person is, by reason of mental incapacity or drunkenness, incompetent to contract. I do not believe that the Lords in *Sinclair v. Brougham* had any intention of overruling these authorities, which still apply in regard to necessities other than goods. To the same effect I may refer to *Nash v. Inman* [1908] 2 K. B. 1, a case relating to infants. Fletcher Moulton L.J. (at p. 8) agrees with the views expressed in *Rhodes v. Rhodes* that the language about the implied contract is somewhat unfortunate, and adds: 'An infant, like a lunatic, is incapable of making a contract of purchase. . . . The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*.' In *Baylis v. London (Bishop)* [1913] 1 Ch. 127, at p. 140, Hamilton L.J. says of claims for money paid by mistake: 'The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back.' This does not put the case on contract, which is reciprocal. Lord Sumner (as he had become) again discusses the claim for money paid by mistake in *Jones v. Waring & Gillow* [1926] A. C. 670, at p. 696. He takes *Kelly v. Solari* as the leading case. He points to the peculiar character of coin or currency. If goods, he says, are delivered to the wrong person, they do not become the property of the receiver,

‘for passing of property is a question of intention, and obviously the tradesman never meant in such circumstances to make his goods the property of the wrong man’. Equally, he proceeds to say with reference to *Solari’s Case*: ‘The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. If so there was no real intention on the company’s part to enrich her.’ I cite this passage not on the topic whether either or both parties knew of the mistake, but as taking the essential basis of the claim to be property. The same great judge in *Baker v. Courage & Co.* (at p. 66) refers to the case where the defendant is required to return something which has come into his possession, but which he is not entitled to keep. There is no reference to contract implied in law. The property concept has superseded the implied contract concept, as I think it did throughout *Sinclair v. Brougham*, when the forms of action had receded out of sight.

I have already pointed out that the House of Lords cannot have intended to overrule the established authorities relating to infants, lunatics, drunkards, a category to which before the modern Acts married women were added. So that we must not take too absolutely the epigrammatic phrase ‘The law cannot *de iure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid.’ It is old law that even if a lunatic promised by word of mouth to pay what was in fact a reasonable price for necessities actually supplied, his liability would rest not on the promise, but on the actual supply of the necessities. It is thus just a case where valuable things or services are received by a person from another who has no intention of bounty. However, I feel a difficulty in limiting the concept to the ideas of property. The cases of services rendered or debts discharged certainly afford frequent examples of unjust enrichment. I think it is safer to state the claim for unjust enrichment in such cases as depending on an obligation imposed by law in all the circumstances of the case in order to satisfy the requirements of justice, that is, to avoid what is unconscionable or unconscientious in the words of Parke B., Lord Sumner and, I think, all the Law Lords in *Sinclair v. Brougham*. Such a criterion is said to give the go-by to precedent and to reduce everything to the *liberum arbitrium* of the particular judge, and promote a sloppiness of thought. I do not know why such things are said. I hope the object of the law is to seek and ensure justice. Lord Sumner puts the matter in a nutshell in *Sinclair*

v. *Brougham* (at p. 458) when he is describing his final conclusion: 'In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognized rule of law or equity be disregarded.' Precedent must come first, recognized rules of law and equity must be regarded, otherwise all certainty of law would disappear. But the underlying purpose is justice. In *Sinclair's Case*, it is clear that in order to achieve justice, old limitations (at least assumed if not expressly laid down by the ultimate Court) were passed over and new precedents or at least new extensions of precedent were established. There is another illuminating phrase of Lord Sumner's which occurs in *Hirji Mulji v. Cheong Yue Steamship Co.* [1926] A. C. 497, at p. 510, where he speaks of the doctrine of frustration of contract as 'a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands'.

I cannot understand why it is not more generally recognized that quasi-contract or restitution involves a definite system of rules, just like the rules of contract or tort. Hamilton L.J., in *Baylis' Case* (at p. 140), said that both the equitable and legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallized in the reported common law cases. It was with this in view that he added: 'We are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man".' But he did not mean that the rules applicable to claims for money had and received or restitution were not subject to the same development to fit new circumstances as that found in other regions of law and equity.

It has also been said that the fictional or notional or imputed contract is the only thing that can constitute a relation such as to justify the claim for restitution. I find this difficult to understand. Perhaps underlying the statement is idea of privity, which at one time figured so large in the law of tort. It was obscure what exactly privity meant, but it seemed to bear a vague relationship to privity of contract. In tort this idea led to the conflict of opinion in *Donoghue v. Stevenson* [1932] A. C. 562, but there the idea was finally put to sleep. There was there held to be a duty or a liability arising from the circumstances of the case. A careful study of the English reported cases at law or in equity will, I think, show that the basis of the doctrine of unjust enrichment is, as has been so often here stated, that the defendant has received some property of the plaintiff or received some benefit from the plaintiff, for which it is just (as shown in the prece-

dents) that he should make restitution. That is sufficient to establish the liability, which the law imposes. If this is all that is meant by privity, the term is innocuous. But it is an unnecessary term and may mislead by suggesting some sort of contractual relationship.

When it is said that the law of Restitution is the sphere of sloppiness of thought, I cannot help thinking of the Restatement of the Law of Restitution recently published in America. I can only here refer to the scheme of that work in the baldest outline. I am not here writing a treatise, but merely maintaining a thesis, which is that Restitution is a distinct branch of law capable of, and worthy of, careful study. The Restatement is based on the American cases, which are very numerous and in some ways appear to differ from the English authorities. But they seem to present a substantial agreement with our decisions. The Restatement falls into two main divisions. Part I, which deals with what have been called Quasi Contracts, but is not limited to situations where there may be recovery at law, but also 'situations in which there is a remedy in equity for the payment of money, for the return of a specific thing or for the establishment of a lien'. Part II is devoted to considering the right of a person who has been deprived of property to follow it or its proceeds by means of a constructive trust or an equitable lien. As to the actions at law, it is stated that 'for many years the actions upon the Common Courts not based upon an agreement were said to be actions upon contracts implied in law, to distinguish them from actions based on promises. The fiction that such actions were based upon implied promises was misleading and of late the phrase has largely fallen into disuse, the more descriptive term quasi-contracts being substituted'. The underlying principle is defined to be that a person who has been unjustly enriched (that is, received a benefit) at the expense of another is required to make restitution. The appropriate proceeding in an action at law for the payment of money in States which have statutes providing for the abolition of the distinctions between forms of action is an action in which the facts entitling the plaintiff to restitution are set forth. This seems to correspond with the rule in England since the Judicature Act. There are, of course, States in which the forms of action have not been abolished.

All I can do in this paper is to summarize the different divisions and headings of the Restatement. The first, of sixty-three sections, deals with restitution where there has been payment under mistake. The next deals with payments under

coercion, which includes the various rules and distinctions applicable to duress and undue influence, money paid under compulsion of law, contribution, indemnity and so forth: it also deals with non-officious services rendered voluntarily and also benefits tortiously acquired by the defendant, as for instance conversion, regarded not as a tort but as a case of unjust enrichment. Under all these headings will be found analogous cases which, however, require separate discussion. Part II deals with constructive trusts and other analogous equitable remedies. It is in general an essential condition in these cases that the property should have passed to the defendant, leaving to the plaintiff a claim for a beneficial interest in equity. Constructive trust and equitable lien are distinguished, according as the plaintiff's property has or has not been commingled with the property of others. The various and complicated rules which govern the following of property into its products are explained. Special cases of the transfer of property, as for instance the acquisition of an interest in land under an oral agreement are discussed. This outline is merely to indicate in the most inadequate form the scheme of the work, which I hope will form a stimulus to a complete and detailed survey of the subject as it has been developed in the English Reports.

I must now refer to two decisions in the English Court of Appeal which illustrate the inapplicability to quasi-contract of the theory of the contract implied in law, that is, if the term has any real significance. One is *Craven-Ellis v. Canons, Ltd.* [1936] 2 K. B. 403. The plaintiff had rendered services to a company under what was regarded as a contract, but was in fact a nullity because the directors who signed it were not qualified. It was contended that he could not recover, because there could be no question of an implied contract when the parties had proceeded in the belief that they were acting under an express contract. The argument was rejected. It was held that the law imposed an obligation to pay a reasonable remuneration from the fact of the acceptance by the company of the valuable services, which were clearly not rendered officiously or by way of bounty. In *Brooks Wharf and Bull Wharf, Ltd. v. Goodman* [1937] 1 K. B. 534, the plaintiffs had discharged a liability for customs dues under compulsion of law for which the defendants were primarily liable, because it attached to the defendants' goods. There was a contract of bailment of the goods which contained no term applicable to these circumstances. The Court held that they could not imply a term because they could not say what the parties would have agreed. But they proceeded

to give judgment for the plaintiffs on the basis that the defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt. The test was the unjust enrichment of the defendants at the expense of the plaintiffs.

The true ground might have been expressed in Lord Dunedin's words in *Sinclair v. Brougham* (at p. 431): 'It is clear that all ideas of natural justice are against allowing A to keep the property of B, which has somehow got into A's possession without any intention on the part of B to make a gift to A. Where there is contract the solution is according to the contract, or you might say the position truly does not arise. Such are the cases of a bailment of a chattel or of a loan of money. But there are many cases where the position does arise and where there is no contract.'

Others more learned or more industrious than myself may produce a case under the old forms of action in which the fiction of a contract has been used in order to defeat a claim for restitution, I am at present not aware of any. As I have said, the old common lawyers did not always take their fictions seriously. They used them for their practical value. The fiction of trover in trover and conversion, if scanned too narrowly, might sometimes have had curious results. But in truth the trover like the *assumpsit* was not traversable. But these and other forms were peaceably interred by section 49 of the Common Law Procedure Act, 1852, which says 'all statements which need not be proved . . . the statement of losing and finding and bailment in actions for goods or their value; the statement of acts of trespass having been committed with force and arms, and against the peace of our lady the Queen; the statement of promises which need not be proved as promises in *indebitatus* counts . . . and all statements of a like kind, shall be omitted'. Thus the common *indebitatus* count for money received is stated in Bullen and Leake, Pleadings (3rd ed.) in 1868 to be 'money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff' (p. 44). As these authors say, the rule before 1852 was that, 'In *assumpsit* the declaration stated the debt and then averred the promise by the defendant to pay the debt (*indebitatus assumpsit*) and a breach of that promise, such promise being one which would be implied by law from the debt and not requiring proof as a fact' (*ibid.* p. 35). But Bullen and Leake go on to say that these distinctions had been removed by the operation of the Common Law Procedure Act, 1852. The

authors refer to various sections of the Act, including section 49, and proceed (at p. 36): 'There is now therefore but one form of *indebitatus* count which comprises all the advantages of both the forms (*sc.* debt and *indebitatus assumpsit*) under the old procedure; and the action of *indebitatus assumpsit* is virtually become obsolete.' Why then should the corpse have been disinterred in 1914? The enactment cannot be dismissed as a mere pleading change. It rendered the fiction otiose. The claim was equated to the claim in debt which was not originally based on promise or breach of promise, but rather on property, and was proprietary in character. In this connexion reference may also be made to the rules of 1863, which declared that in the *indebitatus* counts the plea of *non-assumpsit* was not admissible. However, the matter is carried still further by the Judicature Act, 1873, which abolished the forms of action altogether. A pleader now must plead and the plaintiff must prove the facts (not the *fictions*) necessary to support his course of action. I cannot with all respect see any justification now (if there ever was) for paying regard in considering matters of substance in law to fictions or doing otherwise than applying to the actual facts the appropriate juristic rules and remedies. This view of the Court's duty has been expressed by the Court of Appeal (differently constituted) in two cases as I have explained. It is now accordingly, I think, the established law of England, unless or until the House of Lords declares the contrary. I do not think that on a true reading of *Sinclair v. Brougham* the Court of Appeal in so deciding has infringed the principle of *stare decisis*, the proper application of which is fundamental in English law. Decisions, I repeat, are decisions. Views on legal history are not legal decisions. They may form the basis of decisions, though they did not in *Sinclair v. Brougham*. They are simply matters of fact, which change from time to time as knowledge grows. But let it be assumed that it has been stated that the common law not only was, but even now is, that quasi-contract is based on the fiction of a promise and that the statement is intended to be a binding declaration of what the law is, and that it does not matter that it ignores the Common Law Procedure Act and the Judicature Act, and that it confuses legal substance with procedure; still in *Sinclair v. Brougham* the statement is merely obiter dictum, and I may venture to recall Lord Sumner's warning against the will-o'-the-wisp of the *obiter dictum*. Furthermore the *dictum* is limited by the context, if not by the express language to the special case of *ultra vires* borrowing. Lastly, it does not touch the real reach and scope of the doctrine

of unjust enrichment or restitution. It may be said to be merely a matter of words; the phrase, if unfortunate, is innocuous; the law can analyse and develop the doctrine of contract implied in law just as well as if the more accurate terms of quasi-contract or unjust enrichment are used. It may thus be said that the doctrine is the same and capable of the same beneficent application in the service of justice, whether or not people talk of the fiction of a contract implied by law. But I should prefer to do without any such unfortunate and misleading terminology. The room of the fiction is better than its company. Not only is it undesirable that English law should be defaced by superfluous solecisms and illogical phrases, but the ghost of this fiction has, I fear, actually delayed and hindered in England the systematic and scientific study of this important branch of law. I should like to see it forgotten for good and all here and now. But it is certainly doomed. Another generation of lawyers will have forgotten it, or if they ever remember it, will wonder why people troubled to discuss it except as matter of obsolete history.

THE LAW OF DEFAMATION IN SCOTLAND.*

THE RIGHT HON. LORD NORMAND.

THERE are differences between the law of Scotland and the law of England on Defamation which cannot readily be accounted for by any differences in the sources of the two systems. In some chapters of jurisprudence Scots law has derived from the Civil law or the Canon law characteristics which distinguish it from English law. But Scotland has not made substantially larger draughts on these special sources than has England in forming the principles of its law of defamation. Nor can it be said that Stair, who contributed so much to the formation of Scots law, made any marked contribution here. In the one brief passage (Inst. I, ix, 4) in which he treats of defamation he leaves it to be supposed that the law of Scotland, so far as claims for damages for defamation are concerned, and apart from minor differences of procedure, is identical with the law of England. 'Such actions', he says, 'upon injurious words, as they relate to damage in means, are frequent and curious among the English, but with us there is little of it accustomed to be pursued, though we own the same grounds, and would proceed to the same effects with them, if questioned.' It sometimes happens that differences between Scots law and English law are to be explained by differences in the history of the Courts and of jurisdiction in the two countries. But this explanation is at first sight of little avail in the chapter of defamation, and some at least of the distinctive differences which will be described must be referred to other causes.

The history of jurisdiction in defamation can be summarized briefly.

Before the Reformation of 1560 the Church Courts had jurisdiction, and we find for example in the *Liber Officialis Sancti Andree* (edited by Lord Medwyn for the Abbotsford Club in 1845) that many cases of 'scandal' were dealt with by ecclesiastical discipline. Offenders were ordained to appear before the Altar of Our Lady at High Mass and to entreat the forgiveness of the injured party (*Dischingtonne et Smyth*, p. 127), or to

* An address to the Cambridge University Law Society, April 30, 1937.

make a palinode at the place where the offence had been given (*Keringtounne et Brus*, p. 138). Concurrently with the ecclesiastical Courts, the Burgh Courts claimed and exercised jurisdiction to punish slanderers by inflicting secular penalties (*e.g.* Edinburgh Burgh Records, 1530, II, 27). If the evidence of the Laws of the Gild is trustworthy, the Gild also exercised jurisdiction to punish members of the Gild for defamation of another member (Anc. Laws, Burgh Records Society). But the printed records of the supreme Courts, civil or criminal, are silent upon defamation. Neither Balfour's Practicks (written *c.* 1578, printed 1754), which is a digest of the civil law, nor Pitcairn's Criminal Trials, deal with the subject.

Yet it cannot be said that the Court of Session was wholly unconcerned. For it must have dealt with slander at least incidentally in those cases in which a feudal superior claimed tinsel of the feu on the ground of calumny committed against him by his vassal (Craig, *Jus Feudale*, III, v, 30). Moreover, in the unpublished Acts and Decrets (June 30, 1542, vol. I, folio 14A; December 2, 1542, folio 143A; December 11, 1542, folio 152A, 152B)¹ there are entries showing that Elizabeth Forett sued Jhone McCaw for damages for slander, averring that the defender had brought into Court a false charge of theft against her. There is no entry showing how the Court disposed of the action. But the entries which we have are interesting on two grounds: they disclose that the Court of Session thus early in its history entertained an action of damages for slander, and that 'judicial slander', of which more hereafter, was at this early period a stateable ground of action.

In the period following the Reformation the jurisdiction of the Consistory underwent a division. The Commissary Courts (established in 1609) were given jurisdiction in Slander (Injunctions of 1610—Balfour's Practicks, p. 664). But the ordinary Courts of the Presbyterian Church also asserted jurisdiction. It is clear that the Kirk Session, the lowest of these Courts, had power to inflict ecclesiastical discipline (see St. Andrews Kirk Session Register, I, 399, 451) and even secular penalties (*op. cit.* II, 702). It also invoked the aid of the civil magistrates (*op. cit.* II, 798, 814). It seems that an appeal lay against a decision of the Kirk Session upon a question of defamation to the Presbytery and from it to the Synod, and so, presumably, to the General Assembly. The competence of such an appeal was, however, called in question, but no definite decision was reached, because

¹ I am indebted to Mr. J. A. Crawford, Advocate, for drawing my attention to these entries.

the case in which the question arose was compromised (St. Andrews Kirk Session Records, II, 852, 854, 857, 859-60). The Synod of Clydesdale Renfrew and Lennox is found in 1579 reporting a contumacious offender to the Privy Council (R. P. C. June 26, 1579. III, 190).

The local secular courts in the post-reformation period continued to exercise penal jurisdiction, and curious examples are to be found in the Burgh Records of Edinburgh and Glasgow.

The Barony Courts as well as the Burgh Courts played a part in dealing with slander in the seventeenth and eighteenth centuries.² They imposed fines or sentenced the offender to be set in the stocks (Sc. Hist. Soc. Publications. Stitchill Barony Court Records, xxiii. Baron Court of Urie, 51, 109). The punishment in one case (Stitchill Records, p. 57) is described as 'by and attoure the Kirk Session'. Evidently the Barony Court was supplementing in country districts the jurisdiction of the ecclesiastical Court, as did the Burgh Court within burgh (St. Andrews Kirk Session Register, II, 798, 814). One case in the Stitchill Barony Court Records (in 1707, p. 157) is of special interest. In it the Court awarded compensation to the complainant for the injury which he had suffered, an early instance of such an award by the secular Courts.

The Privy Council also in the period before the Union of the Parliaments was active in suppressing libel and slander both by minatory proclamations (*e.g.* May 13, 1572, R. P. C. II, 136-7) and by the exercise of an original penal jurisdiction (*e.g.* *Janet Strang v. Patrick Ogilvy* (1571) R. P. C. I, 100).

Before the eighteenth century actions for damages before the Commissaries were definitely established. As is said in Stair's Institutions (*loc. cit.*), 'Slander is competent to be judged by Commissaries, and therefore a decret of the Commissaries of Edinburgh, upon a pursuit for slander and defamation, decerning the slanderer to make acknowledgement of the injury before the Congregation and to pay an hundred pounds Scots to the party and so much to the poor was sustained by the Lords' (*Deans contra Bothwell*, February 5, 1669, Mor. 7577). The Court of Session as the King's Great Commissary had jurisdiction to review the decisions of the local commissaries, as the case cited shows. In 1750 (*Hamilton v. Arbuthnot* (1750) Mor. 7682) it was held as settled that the commissaries alone had original jurisdiction in matters of slander, though ordinary judges such

² In 1530 the Court of the Barony of Carnwath declined jurisdiction in a complaint of slander on the ground that it belonged to the Kirk law: Sc. Hist. Soc. Publications, The Court Book of the Barony of Carnwath, p. lxxxiv and p. 124.

as the Bailies of the Royal Burgh of Edinburgh had jurisdiction to deal with verbal injury of the nature of slander of goods. Five years later (*Auchinleck v. Gordon*, Mor. 7348) the jurisdiction of the Court of Session was for the first time, so far as our printed records show, sustained as a Court of radical jurisdiction in actions of defamation (see *MacKellor v. Duke of Sutherland* (1859) 21 D. 222, Lord Justice Clerk Inglis, p. 227). Thus the Supreme Court is vindicating against the spiritual Courts a jurisdiction which it may have had in the sixteenth century, but had for a time lost.

In the nineteenth century the original jurisdiction of the Court of Session in defamation was finally established. This result was achieved by successive enactments. The chief changes were the restriction and final abolition of the jurisdiction of the Commissary Courts and their supersession in questions of defamation by trial by jury in the Court of Session. Trial by jury in civil causes was introduced into Scotland in 1815 (55 Geo. 3, c. 42). The new jury Court, subsequently merged in the Court of Session (1 Will. 4, c. 69), had appropriated to it specified causes including actions of damages for defamation (6 Geo. 4, c. 120, s. 28). The transition from the jurisdiction of the Commissary Courts to the jurisdiction of the Court of Session and the difficulties to which it gave rise are illuminatingly discussed by Lord Justice Clerk Inglis in *MacKellor v. Duke of Sutherland* (*cit. supra*). It is sufficient to say here that the jury Court was at first regarded with a sour jealousy by many Scottish judges, one of whom gave as his evidence in 1830 before a Commission appointed to report on its working that 'Scotchmen gain their money with much difficulty and have not the nerve to hazard it in the wager of a jury trial'. Nevertheless, though trial by jury has perhaps never won in Scotland that universal respect and affection in which it is held in England, it has become indispensable and popular in actions of damages for personal injury and for defamation.

The history of jurisdiction in the Scots law of defamation, which has been briefly sketched, discloses no marked peculiarity as compared with the parallel history of the English law. In England the seignorial Courts, the ecclesiastical Courts, and the Star Chamber at different times exercised jurisdiction in slander and libel, much like the consistory or the commissary, the burgh and barony courts, and the Privy Council in Scotland. In the end the King's Bench in England and the Court of Session in Scotland, though by different methods, each asserted jurisdiction.

The differences which to-day exist between the law of

defamation administered in the Court of Session and the law of slander and libel as administered in the King's Bench are nevertheless not fortuitous. The ecclesiastical discipline of the spiritual Courts and the secular punishments of the burgh and other local Courts in Scotland kept steadily in view the effect of the words complained of on the party injured and did not run into fine distinctions such as might be taken in a more advanced and elaborate system of law which had grown slowly from precedent to precedent. The transition from the simple procedure and methods of these Courts to the fully developed law of modern Scotland was both late and rapid. It took place in a rationalizing age, and artificial principles and technical rules which had by then established themselves in England were not accepted in Scotland, where the Courts adhered to the ancient usages of the country when they appeared reasonable and disregarded Stair's own suggestion that in defamation we would proceed to the same effect with the English if questioned. These considerations would explain the absence of any distinction, now or at any time, between slander and libel in Scots law. The other chief points of difference from English law are explainable by other accidents of history and circumstances.

What then are the principles of the Scots Law of Defamation which would strike an English lawyer as distinctive? The first, perhaps, is that if a Scotsman is defamed neither he nor his legal advisers think of any remedy but one, and that is an action of damages in the civil Courts. Criminal proceedings for defamation are now unknown in Scotland. This is a reversal of the past, for the earlier jurisdiction of the spiritual and local Courts was, as has been seen, mainly disciplinary and penal. Even as late as 1831 (*Turner v. Cuthbert* (1831) 9 S. 774), when the sheriff was still exercising a consistorial jurisdiction transferred to him from the Commissary, the complaint concluded for fine and palinode as well as for damages and the complaint required the concurrence of the public prosecutor, a sure indication of its penal outlook. The palinode, which formed no part of the classic Roman law though it was known on the continent, was regarded with disfavour by the judges of the Court of Session as not likely to be sincere (*Chalmers v. Douglas* (1790) M. 6083), and they directed the commissaries to dispense with it. It was inappropriate to an ordinary civil action and it therefore entirely disappeared with the abolition of the consistorial jurisdiction. So also did the fine. It also was inappropriate in a civil action (*Hamilton v. Rutherford*, cited by Borthwick on Libel, pp. 60-2). Accordingly when the way was opened for an action of damages

before a jury, criminal prosecution at the instance of the party injured with the concurrence of the public prosecutor was doomed. No one would choose to be at trouble to exact a fine which would not reach his own pocket when he could sue before a jury for damages payable to himself. The jealousy with which private prosecution has long been regarded in Scotland also played its part in abolishing criminal proceedings for defamation.

There are, of course, both statutory offences and common law offences which may be committed verbally. The statutory offences need not detain us: they are part of the law for the prevention of breach of the peace or for the prevention of corruption at elections. Among the common law crimes are leasing-making (or verbal sedition), murmuring of judges (or falsely charging judges with corruption, partiality or oppression), and the making of false accusations to the criminal authorities (see *Kerr v. Hill* [1936] J. C. 71). But all such offences and crimes are prosecuted by the public prosecutor *ad vindictam publicam* and never by the party aggrieved. There is in Scotland, therefore, no counterpart of private prosecution for criminal libel.

Scots law knows no distinction in principle between written libel and verbal slander. This is a proposition which needs no qualification. In *Brownlie v. Thomson* (1859) 21 D. 480 Lord Justice Clerk Inglis said in broad terms: 'The rule of the law of Scotland is that words spoken or written (for in this respect the law of Scotland recognizes no distinction) casting imputations on moral character are relevant to ground an action for damages.' The basis of liability is the delict of uttering injurious words. But since speech is often impulsive and without serious intent, and writing implies greater deliberation, our Courts have scrutinized more closely the relevance of averments of spoken slander (*Agnew v. British Legal Life Assurance Co., Ltd.* (1906) 8 F. 422). Yet if injurious words are uttered seriously, there is a good ground of action though they are spoken. Scots law accordingly knows nothing of the distinction between slanderous words actionable *per se* and slanderous words which are only actionable on proof of special damage. The Slander of Women Act, 1891, is not applicable to Scotland, for it remedied a grievance which never existed in Scotland. Scots law assumes that damage results from all defamatory words, spoken or written. The uttering of defamatory words either by speech or writing is a quasi-delict and therefore actionable. Special damages, if claimed, must be averred, for example when the pursuer complains not only of damage to his reputation, but also of consequential loss of employment.

Since the insult or delict and not damages is the ground of action, publication of the defamatory words to anyone but the injured party is not essential. The party wronged is entitled to *solatium* for injured feelings though the words are uttered to no one but himself. This was apparently first decided in *Carter v. Crichton* (referred to in *Hutchison v. Naismith* (1808) M. App. Delinquency 4). *Mackay v. McCankie* (1883) 10 R. 537 is the leading case in recent times, and in that case Lord President Inglis showed that the rule applies both to verbal slander and to written libel. Publication, therefore, is never in our law essential; but a letter which is sent to and seen by the pursuer only may be capable of an innocent construction, though if it were shown by the defender to third parties it might take on a more sinister complexion (*Kennedy v. Baillie* (1855) 18 D. 138). And non-publication to persons other than the pursuer limits the damages to *solatium* for injured feelings.

Scots law subjects to liability any party to judicial proceedings for a slander uttered by him or by anyone uttering it with his authority in such proceedings. This constitutes an important difference from the law of England, according to which all judicial pleadings and all statements *in iudicio* are absolutely privileged. Both by the law of Scotland and by the law of England statements made to a Court which has no jurisdiction are unprivileged, since they are not truly *in iudicio*, and statements which are in no way pertinent to the case likewise enjoy no privilege in either country and for the same reason.

But in Scotland statements made *in iudicio*, though they are not only pertinent to the case, but are also in the legal sense relevant, enjoy only a qualified, but a high degree of qualified, privilege. The first reported case in our Courts appears to be the case of *Hill v. Sim*, July 27, 1711 (Fountain-hall ii, 667). The point was there taken that no action lay for defamatory words uttered in Court 'because the *animus iniuriandi* goes to the essence, which can never be presumed of one who applies to the judge in a legal way'. The reply to this was: 'It can never excuse that the defamation was judicial, for law has not been defective to provide against such as well as extra-judicial slanders. And the title *de iniuriis et famosis libellis* is full on this point. And Faber *ad tit. de iniuriis* determines the case *qui alium vocavit in ius et dedit libellum, et succubuit praesumitur animo iniuriandi id fecisse quando existimatio eius qui vocatur inde laedi potest.*' The report bears that 'the lords at first found that what one pursued judicially could not be repute (*anglice* "be considered") a

formal injury. But there being a struggle, many contending that it was of a more heinous nature than extra-judicial calumnies, they stopt the interlocutor till it was further considered.' What was the outcome of the further consideration we nowhere learn. But it is interesting to note that the complainer's argument was founded on the civil law.

It is needless to refer to the numerous cases of this kind where liability has been affirmed. *Ewing v. Cullen* (1833) 6 Wilson & Shaw 566 is important because it went to the House of Lords. In that case Lord Wynford said: 'The principle of the law of Scotland, and that of the law of England, appears to be precisely the same with respect to anything stated in the course of judicature, and though it is false, though it is slander, yet if the party who offers it in evidence believes it to be true, and therefore does not offer it in evidence from motives of malice, it cannot be made the subject of an action.' 'Therefore', he adds, 'the law of England and the law of Scotland—for there are many authorities in the law of both countries—all concur in providing that in these cases you must prove the falsehood and the words, and that when they were spoken the person speaking them knew the falsehoods (*sic*); and so bringing home to the party using the words, that he did not make use of them merely for the purpose of defending himself against the action brought against him, but that he made use of them from a malicious desire to asperse the character of the person to whom they were spoken.'

Lord Wynford's *dictum* that the law of England allowed actions based on defamatory statements made in a judicial process, even if they were pertinent, provided that malice could be proved, is not consistent with more recent decisions.

But in Scotland the action of damages for judicial slander, as it is called, is now firmly established, and if malice be proved it is no defence that the words were pertinent to the action in which they were uttered. The law as thus settled is stated by Lord President Inglis in *Scott v. Turnbull* (1884) 11 R. 1131. The words complained of in that case had been uttered in the written pleadings in a previous action, and they were both pertinent and relevant to that action. The question which the Lord President had to decide was whether the party injured was entitled to go to a jury upon the bare averment that the statements of which he complained were made falsely, maliciously and calumniously. He held that this was not enough and that the bare averment of malice must be supported by averments of facts and circumstances from which malice could be inferred

He said: 'Even if the statement is irrelevant the pursuer must aver malice unless the statement be not only plainly irrelevant but also be impertinent. . . . In the present case there is no question of pertinency or impertinency, for the statement is plainly relevant; and it appears to me that we are here dealing with a case in which something must be alleged to the effect that the relevant statement made by the defender . . . and which it was his duty to make if he believed it or was informed that it was true, was made maliciously. Therefore in order to displace the honest and proper motive of the defender and to show that the statement was made from an improper motive, I think there must be a statement of facts and circumstances from which malice can be inferred. Where the statement is irrelevant of course it is easier to do this, for the statement itself is the foundation for an inference of malice.' The principles laid down by Lord President Inglis were re-affirmed as settled law by Lord President Dunedin in *M. v. H.* [1908] S. C. 1130. It may therefore be taken that in Scots law an action will lie for defamatory words spoken or written in judicial proceedings if the Court before which they were uttered had no jurisdiction, or if the words were wholly impertinent to the action, or if the words were uttered maliciously, even if they were pertinent and relevant, but if they were relevant there must be averments and proof of facts and circumstances from which malice can be inferred.

It may be questioned whether in this matter Scots law has taken the right course. The freedom of a party and his counsel acting for him in judicial proceedings is of the utmost importance for the due administration of justice, and it would be unfortunate if this liberty were restrained by the fear of a subsequent action for damages which might itself be vexatious. On the other hand it may be said that there is nothing to show that in fact the administration of justice has been hampered by the rule which Scots law had adopted, and the safeguards imposed by the Court are probably sufficient to prevent, or at least to discourage, vexatious proceedings for judicial slander.

There is more than a trace in Scots law of an action for damages, not for defamation, but for verbal injury which exposes the pursuer to ridicule, contempt and hatred; and it is a peculiarity of such proceedings that *veritas convicii* is no defence. This cannot be regarded as a mere survival of an erroneous idea once prevalent in Scotland that *veritas* is not a defence to a civil action of damages for defamation. It was

Lord President Inglis who, as Lord Justice Clerk, gave that idea its quietus (*MacKellar v. Duke of Sutherland (cit. supra)*); but it was also he who, as Lord President, affirmed the relevance and competence of an action such as is now to be described. The basis of it is to be found in Erskine's Institute IV, iv, 80: 'A verbal injury when it is pointed against a private person, consists in the uttering of contemptuous words, which tend to vilify his character, or render it little or contemptible. As one may be sensibly hurt by reproachful words, though they should have no tendency to blacken his moral character, sarcastical nicknames and epithets, or other such strokes of satire, are accounted injurious; and even twitting one with the deformity of his person or other natural defect, where it is accompanied by any ill-natured expression that may place him in a ridiculous light, though it is agreed by all that infirmities of that sort imply no real reproach either in themselves or in the just opinion of mankind.' The reported cases in modern times do not suggest so wide a scope for the action as this. In *Wilson v. Sheriff* (1855) 17 D. 528 the pursuer complained of newspaper paragraphs representing him as a person in the habit of indulging in the use of exhilarating beverages and given to gluttony. Several issues were allowed, two of them ordinary issues appropriate to a simple case of defamation and including the words 'falsely and calumniously'. But a third issue was also allowed—whether one of the articles was 'of and or concerning the pursuer and was written in pursuance of an intention to expose him to ridicule and contempt, to wound his feelings as a private individual and to degrade him in the estimation of the society in which he resides.' The word 'falsely', be it noted, is not inserted in this issue. The case in itself is not satisfactory, because the articles complained of were clearly calumnious and a complete remedy might have been found in an action of defamation with an issue in common form, and because one of the judges, Lord Cowan, in giving his assent to the special issue, said that he assumed that the words complained of were false and calumnious. The decision might have been regarded as overruled by *MacKellar v. Duke of Sutherland*. But in *Cunningham v. Phillips* (1868) 6 M. 926 Lord President Inglis himself suggested an issue whether a whole series of newspaper articles was published in pursuance of an intention to expose and did calumniously and injuriously expose the pursuer to public hatred, contempt and ridicule. This issue was allowed by the Court on condition that other

issues in common form were abandoned. The basis of the action was a complaint against a newspaper that it had published articles against a minister insinuating that his manse was a grossly immoral and ill-regulated house, that a great many bastards were begotten in it, that he had been guilty of falsehood, and was likely to commit perjury if put on oath. The Lord President said: 'The pursuer must choose between two issues. If he wishes to prosecute' [*i.e.* proceed] 'on these two articles as for slander, he must take separate issues, but if he is disposed to deal with these, not as distinct slanders, but as incidents or steps in a general course of persecution, he would require to minute that he is not to insist for damages in respect of these as separate slanders.' Lord Deas in a dissenting opinion said: "I am not disposed to doubt that there are some kinds of injurious publications for which, according to our law, there may be a relevant claim of damages, although there is no slander. Examples of such a claim are afforded by cases in which some physical deformity or secret defect, such for example as that peculiar defect in respect of which marriage may be annulled, is wantonly and offensively paraded before the public. Other examples might also be given, and in such cases the truth may very often be an aggravation of the offence and injury.'

Since 1868 not much has been heard of this kind of action. In *Macfarlane v. Black & Co* (1887) 14 R. 870 Lord Young suggested to the pursuer's counsel that he might rely on an issue of holding up to public hatred and contempt in a case where a parliamentary candidate had been subjected to a series of bitter attacks by a newspaper. Counsel, however, preferred to take ordinary issues of false and calumnious defamation. It has been generally supposed that *veritas* would not avail a defender who after many years raked up a juvenile delinquency and used it to discredit the pursuer, and though the cases cited above have not been recently followed, they have never been overruled, and they may yet provide the basis of a new development of the Scots law directed against injurious trespass upon privacy.

These then are the chief points in which the law of Scotland varies from the law of England on defamation. Each system has its own advantages, and it is of value that we, whether we live on the north or the south side of the line which divides this island into two countries, should know something of the law under which our neighbours and fellow-subjects live. The law of Scotland has greatly profited in the past by adopting

English principles where they seemed more rational or better adapted to a changing civilization than the rules which had governed our Courts in the past. Nor has the law of England altogether disdained Scottish methods when an amendment of the law has been deemed advisable. Without aiming at uniformity, English and Scots lawyers can by the interchange of knowledge keep their minds alert to yet further improvements, and this exercise is all the more profitable since we have two neighbouring systems each of which yields a rule of law which civilized men accept as the rule of justice and equity.

THE BENEFIT OF A RESTRICTIVE COVENANT.

S. J. BAILEY.

THE BURDEN OF A COVENANT.

ACCORDING to the general principles of the common law, no man is bound by a contract to which he was not a party. It is true that the personal representatives of a deceased person may be liable upon his contracts after his death, and that covenants contained in a lease may bind assigns of the lease or reversion¹; but the common law admits no other important² exceptions to the general rule.³ Equity, however, evolved an exception of great importance. The decision in *Tulk v. Moxhay*⁴ shows that a negative covenant restricting the user of the covenantor's land may be enforced by injunction against his successors in title⁵; and, when this occurs, the burden of the restrictive covenant 'runs with' (*i.e.* is attached to) the land in equity.⁶

¹ *Rogers v. Hosegood* [1900] 2 Ch. 388, 395; Cheshire, *Modern Law of Real Property* (4th ed.), pp. 208 *et seq.* Apparently assigns of the reversion were not bound by the lessor's covenants at common law; but this was altered by an early statute (*ibid.*, p. 215). Decisions on this topic are ignored in the present essay, for reasons given *post*, note 48.

² Other exceptions are: (i) Persons claiming as assignees of a conditional grant or licence to do what would otherwise be tortious may be sued at law on the condition: thus, if a grantor reserves to himself and his assigns the minerals beneath the land granted and power, conditional on compensating surface owners, to let down the surface, surface owners can sue his assigns for causing damage by subsidence (*Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, C. A.; *Aspden v. Seddon* (1876) 1 Ex. D. 496); (ii) a specialty by which a debtor expressly bound his heirs rendered them liable at common law to the extent of land inherited from him: Cheshire, *op. cit.*, p. 744.

³ The burden of a covenant (other than in a lease) does not run with land at law: *Renals v. Cowlishaw* (1878) 9 Ch. D. 125, 128-9; *Haywood v. Brunswick Building Society* (1881) 8 Q. B. D. 403, C. A.; *L. S. W. Ry. v. Gomm* (1881) 20 Ch. D. 562, 587, C. A.; *Austerberry v. Oldham* (1885) 29 Ch. D. 750, C. A.; *Rogers v. Hosegood* [1900] 2 Ch. 388, 395; *L. C. C. v. Allen* [1914] 3 K. B. 642, 654, C. A. Compare Cheshire, *op. cit.* 296, to the effect that this point has never definitely been decided, and contrast Holdsworth, *History of English Law*, vol. iii, 164, 165.

⁴ (1848) 2 Ph. 774.

⁵ *Re Nisbet and Potts' Contract* [1906] 1 Ch. 386, C. A., shows that the covenant may bind even subsequent owners who are not strictly his successors in title (*e.g.* a squatter and his successors). See, further, Holdsworth, *History of English Law*, vol. vii, pp. 146-7.

⁶ That the restriction attaches at once to the covenantor's land and remains attached to it until a purchaser for value acquires a legal estate therein without notice of the restriction, and does not merely arise afresh when the land passes to a purchaser with notice, was explained, *obiter*, by Jessel M.R. in *L. S. W. Ry. v. Gomm* (1881) 20 Ch. D. 562, 583 (the action concerned an option, not a restrictive covenant). As late as *Rogers v. Hosegood* [1900] 2 Ch. 388, C. A., this was not

From the fact that the burden of the covenant runs only³ in equity, it follows (i) that only an equitable remedy can be obtained in an action against the covenantor's successors in title, and (ii) that they may be able to raise peculiar equitable defences. As to (i), the appropriate equitable remedy for breach of a negative obligation is the injunction. The purely legal remedy of damages is available only against one who is bound in law. Accordingly, any action to recover compensation for damage caused by any breach of a restrictive covenant must be brought against the covenantor himself or, if he be dead, his personal representatives; for he is bound at law by privity of contract, and, though he may have parted with the land, this does not (unless the covenant so provides⁷) put an end to his contractual liability.⁸ Against his successors an injunction was formerly the only remedy available, for they are bound only in equity. By statute,⁹ however, the Court has now a discretion to award damages in lieu of an injunction; and it would seem that this discretion is exercisable whether or not the plaintiff has suffered substantial damage.¹⁰ As regards (ii), equitable claims may be met by defences which would not avail in a common law action. Thus the covenantor's successor may escape liability if he can prove laches, acquiescence, or undue hardship,¹¹ or that he acquired a legal estate in the restricted

completely understood; both Rigby L.J. and Haldane Q.C. (p. 401) denied it in argument, but the judgment of the Court confirmed it (pp. 405-6). See also *Osborne v. Bradley* [1903] 2 Ch. 446, 451; *L. C. C. v. Allen* [1914] 3 K. B. 642, C. A., per Scrutton J. at pp. 666 *et seq.* (with which compare *Cheshire, op. cit.* p. 299, which suggests that *L. S. W. Ry. v. Gomm* wrought an immediate change in the law.) See, further, note 14, *post*.

⁷ No objection was taken to such a provision in the covenant in *Re Union Bank's Conveyance, Miles v. Easter* [1933] Ch. 611, C. A.; *Ridley v. Lee* [1935] Ch. 591; *Drake v. Gray* [1936] Ch. 451, C. A.; *White v. Bijou Mansions* [1937] Ch. 610. Clearly it is not inconsistent with an intention that the burden shall run with the land.

⁸ *L. C. C. v. Allen* [1914] 3 K. B. 642, C. A., at pp. 660, 664, citing *Stokes v. Russell*, 3 T. R. 678. If he still has the land equity may issue an injunction against him in the exercise of its concurrent jurisdiction (*L. C. C. v. Allen, supra*, at pp. 660-1); and against persons bound by privity of contract injunctions are, it seems, more freely given; see *Osborne v. Bradley* [1903] 2 Ch. 446, 451-2; and note 10, *post*.

⁹ Lord Cairns' Act, 1858; see now Judicature Act, 1925, s. 18. An illustration in connection with restrictive covenants is *Osborne v. Bradley, supra*.

¹⁰ See *Kelly v. Barrett* [1924] 2 Ch. 379 (where the Court of Appeal refused to concur in Tomlin J.'s opinion that proof of damage is necessary); *Elliston v. Reacher* [1908] 2 Ch. 374, 395; *Osborne v. Bradley, supra*, at pp. 451, 452. The same appears to apply to the remedy by injunction; but the cases here cited seem to show that Lord Cairns' oft-quoted *dictum* in *Doherty v. Allman* (1878) 3 App. Cas. 709, 719, that a Court of Equity has no discretion to refuse an injunction for breach of a negative covenant, should at least be confined to cases where privity of contract exists between the parties.

¹¹ Recent attempts to establish these defences include *Osborne v. Bradley, supra*; *Re Spencer Flats* [1937] Ch. 86. But they have not often succeeded in actions on restrictive covenants; for this, Lord Cairns' *dictum* may be in part responsible—see preceding note.

land for value and without notice of the restriction—defences which are now more easily established owing to provisions of the Law of Property Act, 1925,¹² and the Land Charges Act, 1925,¹³ respectively. Moreover, it was ultimately decided, in 1914, by two decisions of the Court of Appeal, that the burden of a restrictive covenant does not run with the restricted land unless, at the date of the covenant, the covenantee retains land which will benefit therefrom.¹⁴

Finally, it must be remembered that an injunction is a more effective remedy to compel observance of a restrictive covenant than is the common law remedy of damages. Equity will therefore grant this remedy even against the covenantor himself, still occupying the land concerned. And here again, the fact that this is an equitable remedy shows that peculiar equitable defences may be raised against it, though it may be that such defences are less likely to succeed when, as here, the defendant is bound even at law.¹⁵

THE BENEFIT OF A COVENANT.

The Courts of Equity, having decided that the burden of a restrictive covenant may thus attach to the restricted land, and so bind the covenantor's successors in title, were then faced with the other side of the question. To whom should equity extend

¹² S. 84 enables persons interested in restricted land (1) to apply to an official arbitrator for the discharge or modification of restrictive covenants on grounds very similar to those which would amount in equity to laches, acquiescence or undue hardship, or (2) to apply to the Court for an order declaring whether the freehold is affected by a restrictive covenant, and, if so, what is its nature and extent and whether it is enforceable by anyone. Thus, he is now able to take the initiative himself, e.g. *Re Sunnyfield* [1932] 1 Ch. 79; *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430; *Re Ballard's Conveyance* [1937] Ch. 473 (original covenantor); *Re Spencer Flats* [1937] Ch. 86 (appeal from arbitrator).

¹³ Ss. 10, 13; for restrictive covenants entered into after 1925 (other than between lessor and lessee) registration takes the place of notice: L. P. Act, 1925, ss. 198 (1), 199 (1).

¹⁴ *Millbourn v. Lyons* [1914] 2 Ch. 231, C. A.; *L. C. C. v. Allen* [1914] 3 K. B. 642, C. A. The instructive judgment of Scrutton, J. in this latter case shows that authorities were ignored to procure this result. A much quoted *obiter dictum*, against the then current of authority, by Jessel M.R. in *L. S. W. Ry. v. Gomm* (1881) 20 Ch. D. 562, 583 (an action on an option), that the doctrine of *Tulk v. Moxhay* appears to be an equitable extension of the doctrine of negative easements (he probably meant merely that the burden runs with the restricted land: see *Rogers v. Hosegood*, *post*, at p. 405) was raised by Collins L.J. in *Rogers v. Hosegood* [1900] 2 Ch. 388 at pp. 405, 406 (a very obscure passage, probably *obiter*) to the status of an authority that the burden will not run unless there is a dominant tenement; and finally this *dictum* of Collins L.J. (and another, equally obscure, at p. 407) was followed by two of the judges in *Formby v. Barker* [1903] 2 Ch. 539, C. A., after an unsuccessful attempt (at p. 546) to elicit from counsel the earlier authorities to the contrary. See, further, note 6, *ante*, and compare *Cheshire, op. cit.* 299.

¹⁵ See the authorities cited *ante*, note 10. Nothing has been seen of this alleged distinction in the more recent cases on this subject.

this novel privilege of enforcing the covenant against third parties? Here the common law provided some assistance, and equity has followed its lead.

Although, as we have seen, the common law did not permit the burden of a covenant to run with the covenantor's land, it did permit the *benefit* of (*i.e.* the right to sue upon) a covenant to run with the land of the covenantee. This exception to the strict common law rule against assignments of choses in action has been recognized for many centuries¹⁶; but, as we shall see, it is only allowed to operate if the covenant complies with certain rigid rules.¹⁷ Accordingly, if a covenant complying with these rules is made by A with B for the benefit of B's land, the law permits subsequent owners of B's land to sue A on the covenant. Whether the covenant is positive or negative matters not,¹⁸ nor does it matter whether or not the burden of the covenant is attached to other land.¹⁹ As was said by Farwell J. in a celebrated judgment,²⁰ 'the benefit of the covenants runs at law with the land . . . the covenants are annexed to the land and pass with it in much the same way as title deeds. . . . Thus the right to sue on such covenants passes²¹ [with the covenantee's estate in the land] to the heir and not to the executors; the assignee of such covenants could sue at law in his own name in the days when the assignee of no other chose in action could do so.'

In the days when equity and law were separate systems administered by separate judges, the fact that equity ordinarily follows the law (*i.e.* adopts the existing legal tests) when deciding whether the equitable right to enforce restrictive covenants against a covenantor's successors will pass automatically to a purchaser of the covenantee's land was by no means clear. Equity judges were reluctant to base their judgments avowedly upon technical common law rules with which they were unfamiliar; accordingly, when deciding that a covenantee's successor in title could sue upon a certain restrictive covenant, caution usually impelled them to say that this was so in equity

¹⁶ *E.g. The Prior's Case* (1368) Co. Litt. 385a, cited *Rogers v. Hosegood* [1900] 2 Ch. 388, 395; *Forster v. Elvet Colliery* [1908] 1 K. B. 629, 635, 640; *Re Ballard's Conveyance* [1937] Ch. 473, 482. Also *Spencer's Case* (1583) 5 Co. Rep. 16a. See, further, Holdsworth, *History of English Law*, vol. iii, pp. 161 *et seq.*

¹⁷ The rules which govern this matter are stated more fully hereafter.

¹⁸ *Forster v. Elvet Colliery* [1908] 1 K. B. 629, C.A., affirmed on appeal *sub nom. Dyson v. Forster* [1909] A. C. 98 (covenant to pay compensation to surface owners for subsidence caused by working minerals).

¹⁹ *Rogers v. Hosegood* [1900] 2 Ch. 388, 395.

²⁰ *Ibid.* at p. 394.

²¹ Presumably this word should have been in the past tense, for when Farwell J. spoke freeholds no longer devolved directly upon the deceased's heir: *Land Transfer Act*, 1897.

whether in strictness it ran with the land at law or not.²² The close of the nineteenth century, however, saw the first of a series of judicial *dicta*²³ which openly admit that equity ordinarily follows the law in this matter.

(1) *Original Covenantees.*

Before considering further the circumstances in which the right to enforce a restrictive covenant may pass from an original covenantee to his assigns, it is necessary to ascertain the precise circumstances in which a person can be regarded as an original covenantee in these matters. In the first place, although the law requires a covenant to be under seal, equity has never attached any significance to the form of a contract. Consequently, although the vast majority of restrictive covenants are created by a deed, equally effective results would obtain in equity from an informal restrictive promise: Lord Cottenham's famous judgment in *Tulk v. Moxhay*²⁴ so stated the rule, and it has been so stated in subsequent cases.²⁵ Similarly, if a deed is used but the covenantor fails to execute it, the covenant (though perhaps ineffectual at law²⁶) is none the worse for this

²² *Rogers v. Hosegood* [1900] 2 Ch. 388, per Farwell J. at pp. 397-8.

²³ 'In my opinion there can be no difference between law and equity in construing such covenants. . . . I cannot see how such a covenant could run in equity if it did not run at law': per Farwell J., *Rogers v. Hosegood*, *supra*, at pp. 397-8. That this statement, though rather too sweeping (for, on appeal, it was held that equity will go farther than the law, in exceptional circumstances: see Collins L.J. at p. 404), blazed the trail, can be seen from subsequent *dicta*; thereafter judges usually inquire simply whether the benefit of the covenant would run at law: *Kelly v. Barrett* [1924] 2 Ch. 379, 411, per Warrington L.J.; *Torbay Hotel v. Jenkins* [1927] 2 Ch. 225, per Clauson J. at pp. 239, 240 ('equity, so far as the benefit of the covenant is concerned, merely follows the law, and is resorted to only for the purpose of furnishing the form of remedy (e.g. injunction rather than damage) or of removing such difficulties as that which in fact arose in *Rogers v. Hosegood* . . .'); *Re Ballard's Conveyance* [1937] Ch. 473, per Clauson J. at pp. 478-9 ('the question who can be sued upon the covenant . . . may depend upon equitable considerations. When, however, the question is who can sue on such a covenant, the question becomes one of law in the strict sense'). These *dicta* of Clauson J. appear to imply even that equity's jurisdiction here, though operating against persons who are not bound at law, is ordinarily concurrent only, and are striking evidence of the direction which judicial opinion has taken. In the former case the learned judge actually said (citing the *Strathcona Case* [1926] A. C. 108, 124) that equity, in such cases, 'is exercising its concurrent and auxiliary jurisdiction . . . and follows the law'. And in *Re Ballard*, although the question before him concerned land which was still in the hands of the actual covenantor (who was bound even in law by the covenant), this fact was not mentioned nor was it relevant, for the question at issue (under L. P. Act, 1925, s. 84 (2)) was whether the land was affected by the restriction.

²⁴ (1848) 2 Ph. 774, at p. 777.

²⁵ *Keates v. Lyon* (1869) 4 Ch. App. 218, 226; *Formby v. Barker* [1903] 2 Ch. 539, C. A., at pp. 547, 555.

²⁶ Non-execution by the intended covenantor is not necessarily fatal at law; for if the deed grants land to him he takes the land subject to the conditions on which it is granted: *Formby v. Barker*, *supra*, per Vaughan Williams L.J. at p. 549; *Elliston v. Reacher* [1908] 2 Ch. 665, per Cozens Hardy M.R. (during

in equity.²⁷ On the other hand, although neither law nor equity requires a covenant to be executed by its covenantees, they must, at the date of the covenant, be in existence and be so described therein as to be capable of being identified at once.²⁸ Hence if a covenant is expressed to be made with Jones, the present owner of Blackacre, '*and with the future owners thereof*' (or '*and with his successors in title*'), a subsequent owner of Blackacre who desires to enforce the covenant cannot argue that it expressly includes him as a covenantee. His right to sue must rest, if it can, upon proof that the benefit of the covenant has passed in some way from Jones, the original covenantee, to him.²⁹ On the other hand, if a covenant is expressed to be made '*with the present owners*' of certain lands, or can be construed to include them, these owners are presently identifiable and can therefore sue upon it as original covenantees.³⁰ Here, it might be thought, they would not need to prove that the covenant is annexed to their land, for they claim directly from the contract—not as assignees of it; yet, according to a respectable line of decisions, they were (and perhaps are still) required to do so unless they were actually parties to the deed of covenant.

argument at p. 669), citing Co. Litt. 230b. Moreover the law may imply in a conditional grant a covenant to observe the condition: *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, 189, C. A.

²⁷ *Formby v. Barker*, *supra*, at pp. 547, 555. Cf. *Re Rutherford's Conveyance* [1938] W. N. 69, where Simonds J. appeared to doubt whether the benefit is then assignable. Equity does not, of course, enforce the contents of a document if the parties did not intend it to bind them or if (as in *Re Rutherford's Conveyance*) their intentions cannot be ascertained. Hence, as in *Elliston v. Reacher*, *supra*, the Court must be satisfied that the failure to execute the covenant was not due to some decision by the parties to have no such covenant or obligation.

²⁸ *Kelsey v. Dodd* (1881) 52 L. J. Ch. 34, *per* Jessel M.R. at p. 39; *Forster v. Elvet Colliery* [1908] 1 K. B. 629, C. A.; *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, C. A.

²⁹ *Forster v. Elvet Colliery*, *supra* (covenant '*with the said lessors and as separate covenants with other the owners or owner occupiers or occupier of the said lands . . . or any part thereof*' to pay compensation for subsidence: *held*, future owners could not sue as original covenantees, but could sue as owners of land to which the benefit was annexed); *Westhoughton U. D. C. v. Wigan Coal Co.*, *supra* (similar covenant '*with the said lessors their heirs or assigns or the lessees tenants or occupiers of the said lands*': *held*, a subsequent lessee cannot sue as original covenantee nor has he an estate to which the benefit was annexed). On similar reasoning it follows that s. 78 (1) of the L. P. Act, 1925, does not enable a covenantee's successor to sue as an original covenantee: see *post*, notes 47, 97.

³⁰ In *Forster v. Elvet Colliery* (see previous note) the words of the covenant '*owners and occupiers for the time being*' were held to include each person (including Forster) who at the date of the covenant owned any part of the lands concerned. Forster, therefore, as an original covenantee, could have enforced the covenant (and, the covenant being annexed to the land of each owner, purchasers or devisees from such owners could enforce it). See also *Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430 (restrictive covenant by purchaser in 1887, '*with the Commissioners and their successors and also as a separate covenant with their assigns owners for the time being of the land adjoining the land hereby conveyed*': *held*, all the then owners of adjoining lands previously acquired from the Commissioners were original covenantees).

The origin of this anomaly is a curious rule of the common law which prescribed that no person could claim, as an original covenantee, to have the benefit of a covenant contained in an indenture³¹ unless he was named therein as a party to it.³² Section 5 of the Real Property Act, 1845,³³ abolished this old rule so far as covenants 'respecting any tenements or hereditaments' are concerned. But the Courts, for some obscure reason,³⁴ have persisted in construing the section as applicable only when the benefit of the covenant in question will run with the covenantee's land.³⁵ This section has since been repealed³⁶ and reappears (somewhat differently worded) as section 56 of the Law of Property Act, 1925³⁷: 'A person may take . . . the benefit of . . . any covenant or agreement over or respecting any land or other property, although he may not be named as

³¹ Unlike a deed poll (a deed made by and expressing the active intention of one party only), an *indenture* is a deed to which two or more persons are parties and which evidences some act or agreement between them: Halsbury, *Laws of England* (2nd ed.), vol. x, p. 189. For the origin of indenting, each 'party' having one of the 'parts' (containing a copy of the deed) into which the parchment was cut by an indented (or wavy) line, see *op. cit.* p. 190. After October 1, 1845, a deed may take effect as an indenture though not describing itself as such, and though not indented (see, now, L. P. Act, 1925, s. 56 (2)).

³² *Forster v. Elvet Colliery*, *supra*; *White v. Bijou Mansions* [1937] Ch. 610, 623. The rule applied equally to persons claiming an immediate legal interest in land (though not, it seems, a future or an equitable interest, or an interest in personality) under an indenture (though not a deed poll): *ibid. per* Simonds J. at pp. 623—625.

³³ As from October 1, 1845. It abolished the rule also in respect of grants of interests in land (see previous note).

³⁴ The reason appears to be that 'respecting any tenements or hereditaments' (the words of the section) have the same significance as 'relating to land'—a phrase which, when applied to the benefit of a covenant, was usually intended to mean *running with the land*: *per* Farwell L.J., *Forster v. Elvet Colliery* [1908] 1 K. B. 629, at pp. 639, 640.

³⁵ *Forster v. Elvet Colliery*, *supra*, C. A.; the covenant here was capable of running with the land, so the section was applied. On appeal, the House of Lords, *per* Lord Macnaghten, confirmed the decision but doubted whether the section should be thus confined: *Dyson v. Forster* [1909] A. C. 98, 102. Despite this *dictum*, the Court of Appeal, regarding it as *obiter*, has twice held itself bound by its own decision in that case—*viz.* that the section is confined to covenants which run with the land: *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159; *Grant v. Edmondson* [1931] 1 Ch. 1 (where Farwell L.J., at p. 28, nevertheless expressed the view that if the section is so interpreted the reference therein to covenants 'might just as well have been omitted altogether'). Compare Luxmoore J., *Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430, who appeared (*obiter*, at pp. 437—438) to regard Lord Macnaghten's expression of doubt (above) as stronger than these decisions of the Court of Appeal.

³⁶ L. P. Act, 1925, s. 207, and Seventh Schedule.

³⁷ Apparently the Courts feel some doubt whether the new section is retrospectively applicable to pre-1926 covenants. In *Grant v. Edmondson*, *supra*, the Court of Appeal ignored the new section and applied the original section (covenant dated 1867). In *Re Ecclesiastical Commissioners' Conveyance*, *supra*, Luxmoore J. mentioned both sections, but *semble* applied the new section (covenant dated 1887). In *White v. Bijou Mansions* [1937] Ch. 610, Simonds J. applied both sections alternatively, with identical results on the question before him (covenant dated 1890), and expressly refrained (at p. 622) from deciding which was the appropriate section. Compare *Zetland v. Driver* [1937] Ch. 651, where the covenant was dated 1928 and was therefore governed solely by the later section.

a party to the . . . instrument.' The wording of the new section, though open to criticism in several directions,³⁸ appears to provide the Courts with ample grounds for deciding that it is in no way confined to covenants which will run with the covenantee's land.³⁹ Thus Luxmoore J. has recently expressed the view that the words 'respecting any land or other property' are a clear indication that the section may assist a covenant that does not run with the land, for they clearly include even a covenant which is concerned only with goods.⁴⁰ In relation to our subject, however, the main importance of these sections lies in their application to covenants which do run with the land of a covenantee. When, for example, the owner of a large estate, having already sold parts of it, desires to impose upon a purchaser a restrictive covenant the benefit of which will attach even to those portions of the estate which the vendor has already sold, he can do so without difficulty. So long as the purchaser's covenant is expressed to be made with the vendor and with the *present* owners of the plots previously sold, the right to enforce it can be annexed as easily⁴¹ to the plots previously sold as to the land which is still in the hands of the vendor⁴²; otherwise the attempted annexation will fail for want of original covenantees.⁴³ Twice during the past year a decision has turned

³⁸ In *White v. Bijou Mansions*, *supra*, Simonds J. gives a neat account of the origin and scope of the mischiefs which the earlier section was designed to remedy, and proceeds to criticize the innovations contained in the new section on various grounds (pp. 623—625).

³⁹ Thus the new words, 'any covenant . . . over or respecting land' (unlike the words of the earlier section: see note 34, *ante*) are not particularly appropriate to covenants which run with a covenantee's land. Indeed, the word 'over' implies that a covenant is within the section if it concerns only land of the covenantor, and that it is then irrelevant to inquire whether it concerns land of the covenantee or even whether he has any land.

⁴⁰ *Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430, 438. This *dictum* appears to have been *obiter*, for his conclusion (at p. 441) shows that the covenants before him did in fact run with the lands concerned. 'In my judgment the original covenantees and the persons deriving title under them can still sue on the covenants in question although the original covenantees were not parties to the conveyance.' Two subsequent decisions (*White v. Bijou Mansions*, *ante*; *Zetland v. Driver*, *ante*), in which the covenants were not such as would run with the land, did not consider the point—the section being held inapplicable for other reasons (see notes 44—47, *post*).

⁴¹ The general requirements for effective annexation are described in subsequent paragraphs.

⁴² E.g. *White v. Bijou Mansions* [1937] Ch. 610; *Re Ecclesiastical Commissioners' Conveyance*, *supra*; *Forster v. Elvet Colliery* [1908] 1 K. B. 629, C. A., affirmed *sub nom.* *Dyson v. Forster* [1909] A. C. 98. In *Forster v. Elvet Colliery* this result was reached by construing a covenant with the vendor and 'with the owners for the time being' of adjoining lands, as meaning primarily the *present* owners of such lands. A similar course was adopted also in *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, C. A., and in *Re Ecclesiastical Commissioners' Conveyance*, *supra*.

⁴³ An exception exists where the properties are part of a so-called 'building scheme' (see note 37, *post*). That the covenant is intended to be made with all owners within the scheme is there sufficiently shown by the surrounding facts.

on this very point. That the enforcement of a particular covenant would benefit a person or his land does *not* of itself enable him to wield the statutory weapon and sue in the guise of an original covenantee: neither of the sections can assist him unless he is a person *with whom the covenant purported to be made*.⁴⁴ Thus, as was decided in *White v. Bijou Mansions, Ltd.*,⁴⁵ a purchaser who enters into a restrictive covenant 'with the vendor his heirs and assigns' does not thereby purport to covenant with previous purchasers from that vendor; consequently, neither such purchasers nor their successors in title can⁴³ enforce the covenant. And, for like reasons, as was decided in *Zetland v. Driver*,⁴⁶ if such a covenant is expressed to be made 'with the vendor' simply, a person who subsequently acquires other land from the vendor cannot sue under the statutes as an original covenantee; for the covenant was not expressed to be made *with him*.⁴⁷

(2) *Successors in title to a Covenantee's land, to which benefit is annexed.*

Let us now examine the strict legal rules for annexing the benefit of a covenant to land, as they have been explained and developed (for hitherto they had been rarely applied⁴⁸) by the equitable decisions on restrictive covenants, and observe in each

⁴⁴ *White v. Bijou Mansions* [1937] Ch. 610, followed, as to L. P. Act, 1925, s. 56, in *Zetland v. Driver* [1937] Ch. 651.

⁴⁵ [1937] Ch. 610; affirmed on appeal [1938] W. N. 88, the appellants conceding this point.

⁴⁶ [1937] Ch. 651.

⁴⁷ Fergus Morton K C. (as he then was) argued for the plaintiff that s. 78 (1) of the L. P. Act, 1925, applied to the covenant ('A covenant relating to *any* land of the covenantee shall be deemed to be made with the covenantee and his successors in title . . . and shall have effect as if such successors . . . were expressed'), and that it must therefore be read as a covenant 'with the vendor and his successors in title', and so would include the plaintiff as an original covenantee. The learned judge (Bennett J.) did not deal specifically with this argument; but there would appear to be two possible answers to it: (1) s. 78 applies only to a covenant 'relating to land' of the covenantee, and so is presumably confined (*ante*, note 34) to covenants which run with the land (this present covenant did not so run; had it done so, the plaintiff could have sued simply as the owner of the land); (2) only persons presently identified by the covenant can be original covenantees (*ante*, notes 28, 29).

⁴⁸ Ancient though they were, their activities at common law had hardly extended beyond covenants for title (*Rogers v. Hosegood* [1900] 2 Ch. 388, 396; Holdsworth, *History of English Law*, vol. iii, 158-163); and these are now commonly implied by statute (with or without modification), whereupon they run with the covenantee's estate by force of the statute: L. P. Act, 1925, s. 76 (6) (7). Moreover, although at common law the covenants of a lease might run with the land, several judicial warnings show that the rules as to covenants between landlord and tenant are *sui generis* and inapplicable elsewhere: *Haywood v. Brunswick Building Soc.* (1881) 8 Q. B. D. 403, C. A., 410; *Austerberry v. Oldham* (1885) 29 Ch. D. 750, C. A., 781; *Grant v. Edmondson* [1931] 1 Ch. 1, C. A., 32.

case the circumstances in which equity has refused to follow the strict letter of the legal rule.

1st Rule: (a) The original covenantee must have, when the covenant is made, an estate in the land to which the covenant is intended to attach; and (b) his successor cannot enforce the covenant unless he has that same estate. In this respect equity has followed the spirit of the legal rule,⁴⁹ but not its technical details.⁵⁰ (a) Thus it has been held that neither at law nor in equity (apart from a possible equitable exception in favour of a building scheme⁵¹) can the benefit of a covenant be annexed to land in which the covenantee has no interest at the date of the covenant.⁵² But, for this purpose, whereas the common law would regard a covenantee as a stranger to the land if he has but an equitable interest therein, equity naturally denies this and accordingly may treat a covenant as annexed to land whereof the covenantee is the equitable (though not the legal) owner.⁵³ In most of the cases on annexation the covenantees had legal estates in fee simple in the lands intended to benefit by the restrictive covenants concerned. Nevertheless, it seems that the benefit of a covenant may equally well be annexed to a lease, if such is the extent of the covenantee's estate in the land. This appears to be permissible even at law, and whether the

⁴⁹ *Re Ballard's Conveyance* [1937] Ch. 473, 479—480. In *Kelly v. Barrett* [1924] 2 Ch. 379 (restrictive covenant annexed to road retained by covenantee, surface of road subsequently taken over by local authority, successor to subsoil sues on covenant), Tomlin J. held that plaintiff could not sue the covenantor's successor because, *inter alia*, he does not 'sue in respect of the estate or interest which belonged to his predecessor' (p. 396). The Court of Appeal affirmed the decision, but not, *semble*, on this ground; and it would seem that it cannot be supported on this ground, for questions of area appear to be irrelevant (see notes 60, 61, *post*).

⁵⁰ 'The questions which have arisen with respect to the devolution of the benefit of [restrictive] covenants have been decided without reference to any technical distinctions depending upon the covenants running or not running [at law] with the land': *Keates v. Lyon* (1869) 4 Ch. App. 218, 223.

⁵¹ As to building schemes, see *post*, § 4. That they enable a vendor to take covenants in favour of plots previously sold is not really exceptional, *semble* (see notes 30, *ante*, 31 *post*).

⁵² *Torbay Hotel v. Jenkins* [1927] 2 Ch. 225 (covenantee had previously sold the land concerned), at pp. 239, 240; *Rogers v. Hosegood* [1900] 2 Ch. 388, 395. Some passages in *Keates v. Lyon*, *supra*, at pp. 226, 227 (see also *Reid v. Bickerstaff* [1909] 2 Ch. 305, 326), suggest that a covenant may conceivably be annexed in equity to land which the covenantee expects to acquire in the future; but this seems to be inconsistent with later decisions. Even the *burden* of the covenant does not now run in equity if, at the date of the covenant, the covenantee has no land to be benefited by it: see note 14, *ante*.

⁵³ *Rogers v. Hosegood* [1900] 2 Ch. 388. The covenantees had previously mortgaged the land, and so had but an equity of redemption at the date of the covenant. The point was not raised before Farwell J., but was raised and decided in the Court of Appeal (at p. 404). Although counsel for the plaintiff (Haldane Q.C. at p. 401) claimed only that the covenant ran with the equitable ownership, the Court said that it ran with the *land*.

covenant was made by the landlord of the lessee⁵⁴ or by a third party.⁵⁵ Indeed, it would seem from the authorities that, whenever the covenantee has a legal estate in possession, the covenant can be legally annexed to his estate.⁵⁶ But if he has only a rentcharge,⁵⁷ or, it would seem, any other merely incorporeal interest in the land,⁵⁸ his interest is not one to which the benefit of a covenant can be attached at law. Whether equity will take a different view, when this question arises in relation to a restrictive covenant, remains to be seen.⁵⁹ (b) At law the

⁵⁴ *Spencer's Case* (1583) 5 Co. Rep. 16 (fourth resolution, quoted Cheshire, *op. cit.* 213).

⁵⁵ In *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, 170, Swinfen Eady M.R. evidently assumed this to be so at law, when he indicated that had the plaintiff's lease existed at the date of the (positive) covenant he could have sued the covenantor (a subjacent lessee) under R. P. Act, 1845, s. 5; for the section was held to apply only to a covenant running with the land (*ante*, note 35). It is so by statute as regards the benefit of covenants for title given to the purchaser of a lease: L. P. Act, 1925, ss. 76 (1), (6); 77 (1), (5); replacing similar provisions of the Conveyancing Act, 1881. It is so in equity also—*e.g.* when a building scheme exists: *Pearce v. Maryon-Wilson* [1935] Ch. 188; *Spicer v. Martin* (1889) 14 App. Cas. 12, 25.

⁵⁶ In *Forster v. Elvet Colliery* [1908] 1 K. B. 629, C. A., *per* Cozens-Hardy M.R., at p. 636, and again in *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, C. A., *per* Swinfen Eady M.R., at pp. 169, 170, it was indicated that the positive covenants, there made with (*inter alia*) 'the occupiers or occupier for the time being' of subjacent land at the date of the covenant, could run with the estates of present occupiers; for it was implied that R. P. Act, 1845, s. 5, would enable them to enforce the covenant, and this section was held to apply only to covenants running with the land. But see note 58, *post*, as to the dangers of arguing by analogy on this subject.

⁵⁷ *Grant v. Edmondson* [1930] 2 Ch. 245; [1931] 1 Ch. 1, C. A.; *Torbay Hotel v. Jenkins* [1927] 2 Ch. 225, 299; *Haywood v. Brunswick Building Society* (1981) 8 Q. B. D. 403, C. A. (summarized *post*, note 59). Wolstenholme and Cherry's Conveyancing Statutes (12th ed.), p. 356, suggests that, since the Law of Property Act, 1925, defines 'land' as including a rentcharge (s. 205 (1) (ix)) and enacts (s. 78) that a covenant 'relating to land' is deemed to be made with the covenantee and his successors in title, the position is now reversed. But in *Grant v. Edmondson* the covenant was made with the covenantee and his successors in title, yet it did not run with the rentcharge. Moreover, the words 'relating to land' appear to confine the operation of this section to covenants which would run with land at common law: see notes 34, 47, *ante*.

⁵⁸ In *Grant v. Edmondson*, *supra*, the Court of Appeal was not clear whether earlier decisions that covenants cannot be annexed to a rentcharge rest upon its incorporeal nature or whether the rule is merely arbitrary (*e.g.* Lawrence L.J. at p. 26). Romer L.J. (at p. 28) thought all the common law rules as to covenants running with land so arbitrary and illogical as to preclude any reasoning by analogy. In *Miles v. Branch* (1816) 5 M. & S. 411, 417, Lord Ellenborough said that though covenants can run with land, a rentcharge is not land (meaning, presumably, that it is not a corporeal interest). See also Co. Litt. 47a, 121a (quoted Holdsworth, History of English Law, iii, 165) to the effect that a thing incorporeal cannot properly be appendant to a thing incorporeal.

⁵⁹ The facts of *Haywood v. Brunswick Building Society*, *supra* (vendor sold land in consideration of a rentcharge and a covenant to build on the land; held, his successor to the rentcharge cannot sue purchaser's successor on the covenant (i) because the burden of a positive covenant cannot run with land; (ii) because the benefit of a covenant cannot run with a rentcharge) show that the value of a rentcharge may well be much affected by the observance or non-observance of covenants as to the user of the land charged thereby. In *Torbay Hotel v. Jenkins*, *supra*, there was a restrictive covenant, but no attempt had been made to annex the benefit of it to the rentcharge reserved by the covenantee.

benefit of a covenant annexed to land does not pass with the land to successors of the covenantee unless they acquire *his estate* in that land or in some part of it (it appears to be unnecessary even at law that his successor, suing on the covenant, should have acquired the *whole area* of the estate⁶⁰ so long as he can show that what he has satisfies the other essentials of annexation, and this is certainly so in equity⁶¹). Thus if a covenant is made with the owner of a fee simple estate, so as to run with it, and the owner then grants a lease of the land, the right to enforce the covenant does not at law pass with the land to the lessee.⁶² Here, however, equity declines to follow the law; if, therefore, the covenant in question were a restrictive covenant, the lessee could sue thereon for equitable relief,⁶³ for, although he is not strictly an assign of the covenantee's estate, he has the land for the benefit of which the covenant was made. In other words, although the phrase 'runs with the land' was invented by common lawyers, the benefit of a covenant runs at *law* not with the land but with the covenantee's estate in the land.⁶⁴ And equity's departures from the common law have been mainly⁶⁵ due to its desire to ensure that covenants can in fact run with the land, into whosoever hands it comes.⁶⁶ The natural result of equity's liberating influence here is that modern judgments rarely pay much attention to the rule which we are now considering, so long as the land concerned was vested in the

⁶⁰ This was so at law as to covenants for title: *Rogers v. Hosegood* [1900] 2 Ch. 388, 396. In *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, 176 (action at law on positive covenant), Duke L.J. said, *obiter*: 'The reasons which underlie the common law rule as to the destruction of a condition by the severance . . . of the estate which was subject to the condition do not seem to me to apply to the case of a covenant.' Compare the rule that, despite s. 136 of the Law of Property Act, 1925, an assignment of part of a chose in action operates only in equity: *Williams v. Atlantic Assurance Co.* [1933] 1 K. B. 81. See also note 20, *post*, for an obscure *dictum* which might almost be read to mean that covenants cannot at law be annexed to every part of the land.

⁶¹ *E.g. Drake v. Gray* [1936] Ch. 451, C. A. This and similar decisions are considered *post* in relation to the other essentials of effective annexation.

⁶² *Westhoughton U. D. C. v. Wigan Coal Co.*, *supra*, per Cozens-Hardy M.R. (Eve J. concurring), at pp. 170, 171. Duke L.J., at p. 176, appeared to doubt it, but thought it unnecessary to decide. It is historically correct, however: see Holdsworth, *History of English Law*, vol. iii, 158.

⁶³ *Westhoughton U. D. C. v. Wigan Coal Co.*, *supra*, at pp. 170, 171; *Taite v. Gosling* (1879) 11 Ch. D. 273. Presumably equity would also allow derivative equitable owners (*e.g.* for life or in tail) to enforce the covenant, either directly or via their trustees.

⁶⁴ Holdsworth, *History of English Law*, vol. iii, 158.

⁶⁵ In *Torbay Hotel v. Jenkins* [1927] 2 Ch. 225, Clauson J. indicated, at p. 239, that apart from the 'building scheme' cases (*post*, § 4) this is the *only* respect in which equity departs from the common law rules or annexation.

⁶⁶ Whether the benefit would pass with the land to a squatter appears not to have been decided (*cp.* note 5, *ante*). It is regarded as annexed to the land although made with a mere equitable owner: see note 53, *ante*.

covenantee at the date of the covenant and the plaintiff is possessed of it by title derived from him.⁶⁷

*2nd Rule: The covenant must 'touch or' ⁶⁸ 'concern' the land to which the benefit is to be annexed.*⁶⁹ The earlier decisions show that equity here followed the legal rule and attributed to the phrase 'touch or concern' the same significance as had already been given to it by common law decisions on covenants between lessor and lessee.⁷⁰ The covenant, it was said, must either affect the covenantee's land as regards *mode of occupation*, or it must be such as *per se*, and not from collateral circumstances, affects the value of the land.⁷¹ Of these alternatives the 'value' test, which is the more commonly mentioned and applied,⁷² requires that the covenant 'necessarily affects the value of the land, in this sense, that the owner of the land would get more for the land by reason of the covenant being attached to and annexed to it'.⁷³ But increased value is not the sole criterion even in equity. If the covenant affects the mode of occupation or enjoyment, or (in the words of Lord Macnaghten⁷⁴) the 'nature or quality' of the land, that in

⁶⁷ Thus Clauson J. in *Re Ballard's Conveyance* [1937] Ch. 473, 479, purporting to state and apply to a restrictive covenant the common law rules, said: 'The first question is: what is the land for the benefit of which the covenant was taken? The next question will be: Is the person who claims to enforce the covenant seised of the land by title derived through or under the original covenantee?'

⁶⁸ The alternative form is almost invariably used. 'Touch and concern' (e.g. *Rogers v. Hosegood* [1900] 2 Ch. 388, 404) is rare.

⁶⁹ See *Re Ballard's Conveyance* [1937] Ch. 473, 482.

⁷⁰ The distinction between things 'in esse' and things 'in posse' (Cheshire, *op. cit.* 213) appears not to have arisen in relation to restrictive covenants, perhaps because, although such a covenant may concern something not yet in existence (e.g. the user or enjoyment of houses not yet built) it does not compel the covenantor to do anything.

⁷¹ See *Rogers v. Hosegood*, *supra*. Farwell J. said, at p. 395: 'Adopting the definition of Bayley J. in *Congleton Corporation v. Pattison* [quoted Cheshire, *op. cit.* 211] the covenant must affect the land as regards mode of occupation, or it must be such as *per se*, and not from collateral circumstances, affects the value of the land', and he held (without considering the question of 'collateral circumstances') that the latter alternative was satisfied. The Court of Appeal, at p. 404, said merely that the restrictive covenants in question undoubtedly 'touched and concerned' the land so as to run at law, but indicated at p. 407 that they would not run at law if 'merely personal and collateral'. For the application of this rule in common law cases see *Forster v. Elvet Colliery* [1908] 1 K. B. 629, C. A.; *Dyson v. Forster* [1909] A. C. 98.

⁷² In *Rogers v. Hosegood*, *supra*, at pp. 395, 401, Farwell J. applied only the 'value' test, and counsel in the Court of Appeal relied on it. In *Forster v. Elvet Colliery*, *supra*, at pp. 635, 638, 640, all three judges of the C. A. stated it as the test to be applied, Cozens-Hardy M.R. (at p. 635) stating it to be the common law test for cases not between lessor and lessee. But in *Dyson v. Forster*, *supra*, at p. 102 (followed by Duke L.J. in *Westhoughton U. D. C. v. Wigan Coal Co.* [1919] 1 Ch. 159, 175) the House of Lords, *per* Lord Macnaghten, stated the rule more widely: 'The question is, Does this covenant affect the nature, quality or value of the land, or is it a covenant simply collateral?' The three last-mentioned were purely common law decisions.

⁷³ *Forster v. Elvet Colliery*, *supra*, *per* Cozens-Hardy M.R. at p. 635.

⁷⁴ See note 72, *ante*.

itself will suffice.⁷⁵ Accordingly, a plaintiff who founds his claim to enforce a restrictive covenant upon the ownership of land must be prepared to prove that the enjoyment or value of that land is likely to be directly affected by the prohibited user. And if he has only a part of the land to which the covenant was annexed he must be prepared to prove it as to that part.⁷⁶

This being the rule, a question arises whether a covenant can be annexed to land if it 'touches or concerns' only some undefined part of the land to which it was intended to attach. Two recent decisions indicate that there cannot be any effective annexation in such a case, at any rate if only a relatively small portion of the land is likely to be affected by the prohibited user⁷⁷; nor, it seems, will the Court sever the covenant and hold that the attempted annexation is effective as to that part of the land which it does 'touch or concern'. This was decided in *Re Ballard's Conveyance* [1937] Ch. 473, and followed, a few weeks later, in *Marquis of Zetland v. Driver*.⁷⁸ Fergus Morton K.C. (as he then was), who appeared on each occasion for the covenantee's successor, seeking to enforce the covenant, urged in the latter case that the decision in *Re Ballard* was wrong and that no authority exists that the plaintiff must be able to show that the covenant affects every scrap of the land.⁷⁹ But Bennett J. simply followed Clauson J.'s decision in *Re Ballard* without commenting upon it, indicating that he preferred to leave such questions to a higher Court: 'to do otherwise would only be to make the law relating to the enforcement of restrictive covenants more uncertain than it already

⁷⁵ *Zetland v. Driver* [1937] Ch. 651, 660 (both 'value' and 'mode of occupation' tests applied to a restrictive covenant); *Re Ballard's Conveyance* [1937] Ch. 473, 480. In *Kelly v. Barrett* [1924] 2 Ch. 379, Tomlin J. held value irrelevant if the restrictive covenant will 'secure a particular character to the land' (p. 660). The tests applied in the C. A. were: (i) *per* Warrington L.J. (p. 411), may the land be reasonably regarded as capable of being affected by the performance or breach of the obligation; (ii) *per* Sargant L.J. (pp. 414, 415), the occupation or enjoyment of the land must be capable of being affected by the prohibited user; (iii) *per* Pollock M.R. (p. 403), the restrictive covenant 'must have some connexion with' the covenantee's land, 'in the sense of an interest which unites the two pieces of land', otherwise it is too remote.

⁷⁶ Thus, in *Kelly v. Barrett*, *supra*, all four judges were unanimous that, though a restrictive covenant may conceivably 'touch or concern' the site and soil of a road and be annexed to it, a subsequent owner of the mere subsoil of the road cannot, as such, enforce it, for it does not 'touch or concern' the mere subsoil. Decisions on annexation where the plaintiff has only part of the land concerned turn usually on the 3rd rule, *post*.

⁷⁷ See note 83, *post*.

⁷⁸ [1937] Ch. 651.

⁷⁹ This argument may be correct for 'building scheme' cases; here it may suffice, in an action by the original vendor on behalf of the owners of the various plots, that the covenant benefits the area as a whole: *Northbourne v. Johnston* [1922] 2 Ch. 309. See note 55, *post*.

seems to be'.⁸⁰ In each of these cases, it may be observed, the original parties to the covenant had intended it to run with the land in question⁸¹; the plaintiff had acquired the whole of that land⁸²; and it was evident (though the judgments do not, perhaps, rest upon this) that the *greater part* of that land could not possibly be affected by any breach of the restrictive covenant.⁸³

3rd Rule: There must be proper evidence that the benefit of the covenant was intended to run with the land concerned. As was said in *Rogers v. Hosegood*,⁸⁴ this is, in each case, 'a question of intention to be determined by the Court on the construction of the particular document' which contains the covenant; and, according to the ordinary principles of construction, both the nature of the covenant and the surrounding circumstances may be invoked to throw light upon the matter. For this purpose, the rules of law and equity are identical⁸⁵; so manifold, however, are the possible combinations of words and circumstances, that a detailed consideration of this topic is out of the question. If we ignore the influence of surrounding circumstances, and of extraneous indications in the document, we may say that the covenant must itself show clearly that it is intended to run with the land and with precisely what land it is to run.⁸⁶ The intention to run is commonly shown⁸⁷ either (i) by indicating that the covenant is made with the covenantee *as owner* for the time being of the particular land,⁸⁸ or (ii) by stating therein

⁸⁰ *Zetland v. Driver*, *supra*, at p. 661.

⁸¹ In *Re Ballard's Conveyance* [1937] Ch. 473, at pp. 481, 482, Clauson J. indicated (consistently, it is thought, with the authorities) that the question whether a covenant 'touches or concerns' the land is a question of fact, not of the intention of the parties. In *Zetland v. Driver*, *supra* (at pp. 654, 655), counsel contended (i) that this was a stronger case because (unlike *Re Ballard*) the covenant was expressly intended to run with 'every part' of the land, and (ii) that if the covenant is intended to run the onus should be on the defendant to prove that it does not 'touch or concern' the whole of the land; but the learned judge ignored these contentions.

⁸² In *Re Ballard* this was clearly so (*ibid.* p. 480). In *Zetland v. Driver* the statement of facts suggests it, for nothing is said of any intervening sales.

⁸³ In each case the learned judge stated this to be so; but whereas this may have been the *ratio decidendi* of *Re Ballard* (see pp. 480, 481), that case was treated in *Zetland v. Driver* (p. 658) as deciding that the covenant must touch or concern every part of the land, and was so applied (at p. 660).

⁸⁴ [1900] 2 Ch. 388, 396, *per* Farwell J.; also *per* Collins L.J. (referring to *Renals v. Cowlishaw*, *post*), at pp. 407, 408. The effect of surrounding circumstances is most striking in the cases on building schemes: *ibid.* at pp. 397, 408. Building schemes are considered hereafter (*post*, § 4).

⁸⁵ *Ibid.* at p. 397.

⁸⁶ *Renals v. Cowlishaw* (1879) 11 Ch. D. 866, *per* James L.J. at p. 868; *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, at pp. 620, 621 (Tomlin J.), 628, C. A.

⁸⁷ *Per* Greene L.J., *Drake v. Gray* [1936] Ch. 451, 466.

⁸⁸ A still stronger indication, frequently found, of intention to run is 'with the vendor and his successors in title [or heirs and assigns] or other the owner or

that the covenant is intended for the benefit of the land—for it is not enough that the covenant will *in fact* benefit the land.⁸⁹ And in either case, the deed should indicate, if such is the intention, that the benefit of the covenant is intended for *every portion* of the land—otherwise it will run only with the land as a whole.⁹⁰

*Rogers v. Hosegood*⁹¹ provides the classic example of a covenant which will run ('with intent that the covenants might enure to the benefit of the vendors their heirs and assigns and others claiming under them to all or any of their lands adjoining the said premises'); *Renals v. Cowlishaw*⁹² is the classic example of one which will not ('with the vendors their heirs, executors, administrators and assigns').⁹³ Evidently, therefore, mention of the covenantee's 'assigns' does not suffice. The word 'assigns', though indicating that the covenant is to be assignable,⁹⁴ does not necessarily mean *assigns of the land*—it may equally well mean merely 'assigns of the covenant'.⁹⁵ This, presumably, is the main reason why section 58 of the Conveyancing Act, 1881, which enacted that covenants relating to land are deemed to have been made with the covenantee *and his assigns*, has never (so far as the writer is aware) achieved any prominence in this subject.⁹⁶ Indeed, section 78 of the Law

owners for the time being of the said lands or any part thereof'. See *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, 624; *Drake v. Gray*, *supra*, at pp. 459, 463.

⁸⁹ See *Reid v. Bickerstaff* [1909] 2 Ch. 305, *per* Cozens-Hardy M.R. (pp. 320, 321), and Buckley L.J. (p. 325); *Re Sunnyfield* [1932] 1 Ch. 79, 84; *Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430, 437.

⁹⁰ *Re Union Bank's Conveyance*, *supra*, C. A., at p. 628; *Drake v. Gray*, *supra*. This is usually done by stating that the covenant is (i) with the covenantee and his successors, owners for the time being of, or (ii) for the benefit of, 'the land or any part thereof'. But in rare circumstances, as in *Drake v. Gray*, such clear indications are not essential. It is not enough, *semble*, that the covenant is expressed to be made 'with the covenantee and other the owners or owner for the time being' of the land concerned (*ibid.*), for 'owners' may mean merely concurrent owners of the whole.

⁹¹ [1900] 2 Ch. 388.

⁹² (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866, C. A.

⁹³ See note by Mr. H. A. Holland, 49 L. Q. R. 483.

⁹⁴ *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, C. A., 629.

⁹⁵ *Rogers v. Hosegood* [1900] 2 Ch. 388, 396; *Re Union Bank's Conveyance*, *supra*, C. A., at p. 629. Apparently, however, the word 'assigns' has always been a sufficient indication that the *burden* is intended to run with the covenantor's land—presumably because the burden of a contract, unlike the benefit, is not assignable *per se*. By L. P. Act, 1925, s. 79, a restrictive covenant is now deemed to extend to subsequent owners and occupiers of the restricted land, unless it expresses a contrary intention.

⁹⁶ Compare *Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430, 440, where Luxmoore J. is reported as saying that s. 58 enabled assigns of the covenantee's *land*, or even of any part thereof, to take the benefit of a covenant. In fact s. 58 did not say what kind of assigns are deemed to be included in the covenant. The word 'assigns' is frequently found in these covenants. But, although the common law may have regarded it as an important indication that

of Property Act, 1925, which now takes its place, implies instead the words 'his successors in title and the persons deriving title under him or them', and enacts that 'successors in title' here includes, for the purposes of restrictive covenants, 'the owners and occupiers for the time being of the land of the covenantee intended to be benefited'. The latter section has a more hopeful appearance than its predecessor, for it implies words which clearly mean *assigns of the covenantee's land*. But it appears to raise several minor difficulties,⁹⁷ and, since it operates only upon post-1925 covenants, the Courts have not yet had an opportunity of solving them.⁹⁸

The right to enforce a covenant which fulfils the three rules described above will run automatically with the land of the covenantee.⁹⁹ Accordingly, it will pass with the land to a subsequent purchaser, unless excluded by the conveyance, and the fact that he was unaware of its existence when he acquired the land matters nothing.¹ Conversely, the covenantee, or his successor, loses the benefit of the covenant as soon as he disposes

the covenant was intended to run, equity did not: hence its unimportance in restrictive covenants. See the *dicta*, during argument, in *Renals v. Cowlishaw* (1878) 9 Ch. D. 125, 129 (*per* Hall V.-C.); *ibid.* (1879) 11 Ch. D. 866, 868 (*per* James L.J.). See also *Rogers v. Hosegood* [1900] 2 Ch. 388, 397, that the rules of construction applied to restrictive covenants by law and equity are identical (the covenant there was made before the Act of 1881, but expressly mentioned 'assigns'). The probable function, therefore, of s. 58 was to remove a possibility that a covenant would not run *at law* if it lacked the word 'assigns'. See *Forster v. Elvet Colliery* [1908] 1 K. B. 629 (an action at law on a positive covenant), where Cozens-Hardy M.R., at pp. 635, 636, implied that the common law had required words of limitation if a covenant was to run—'heirs' to cover heirs or devisees of the covenantee, 'assigns' to include his grantees—and that s. 58 implies those words for that reason: the other *dicta* state that s. 58 implies those words, to what end is not disclosed; on appeal *sub nom. Dyson v. Forster* [1909] A. C. 98 the section was not mentioned (cf. Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed. i, 360, which cites the latter case alone as 'an example of the operation of this section').

⁹⁷ Thus, (i) it refers only to covenants 'relating to the land' of the covenantee, and so is apparently restricted to covenants which are capable of running with the land—see note 34, *ante*; (ii) it does not (cf. s. 79) permit exclusion by an expressed contrary intention—query whether (i) corrects this difficulty; (iii) it does not imply any words (*e.g.*, 'or any part thereof') adequate to annex the covenant to every portion of the land—see note 90, *ante* (compare *Luxmoore J.'s dictum*, *ante*, note 96); (iv) it enacts that the covenant is *deemed to be made with (inter alios)* 'the owners and occupiers for the time being': so far as this means *present* owners (and perhaps even present 'occupiers')—but the *dicta* as to this word are conflicting, see *Forster v. Elvet Colliery* [1908] 1 K. B. 629, 636, 637, 641) it may thereby operate, with the help of L. P. A., 1925, s. 56, to make them original covenantees (see note 30, *ante*): so far as it means *future* owners and occupiers, it seems to be surplusage except as evidence of intention to run (see notes 29, 47, *ante*).

⁹⁸ Counsel, in *Zetland v. Driver* [1937] Ch. 651, 653, 654, urged that (taken with s. 56 of the L. P. A., 1925) it enables a covenantee's *successor* to sue as an original covenantee. But this cannot (see note 47, *ante*) be supported, *semble*.

⁹⁹ See note 20, *ante*.

¹ *Rogers v. Hosegood* [1900] 2 Ch. 388, 408.

of the land to which it is annexed²; if, therefore, the proprietor of restricted land seeks to obtain a release from the restriction, it will ordinarily be useless to seek it from an original covenantor who has disposed of the land concerned.³ On the other hand, the benefit of a covenant which has not been annexed to the land in accordance with the foregoing rules will not run automatically with it, either at law or in equity.⁴ Hence, unless the peculiar incidents of a 'building scheme' apply,⁵ a subsequent owner of the land desiring to enforce the covenant must show that the covenantor effectively assigned it when he assigned the land.

(3) *Successors in title by assignment of the covenant.*

The benefit of a covenant relating to land is a chose in action.⁶ Consequently, although not annexed to land so as to run with it automatically, it is, as such, assignable in equity,⁷ and (now) by statute.⁸ As we have seen, however, equity has complete control over the enforcement of restrictive covenants—if one ignores (as will be done here) the purely legal remedy of damages against an original covenantor. And equity has adopted the view that no action can be brought upon a restrictive covenant against the covenantor's successors in title, except by a plaintiff who has land for the benefit of which the covenant was

² *Formby v. Barker* [1903] 2 Ch. 539, per Romer L.J. (during argument), at pp. 542, 543; *Chambers v. Randall* [1923] 1 Ch. 149, 157; *Re Ballard's Conveyance* [1937] Ch. 473, 478. Presumably he or his representatives retain any right to sue for damages for breaches committed while he had the land (see *Formby v. Barker*, *supra*, per Vaughan Williams L.J., at pp. 549, 550). Compare 'building schemes'—original vendor may sue as trustee for his purchasers, *semble*; see *Kelly v. Barrett* [1924] 2 Ch. 379, 389 (Tomlin J. during argument); *Northbourne v. Johnston* [1922] 2 Ch. 309; *post*, § 4, note 55.

³ And if it was annexed to every part of the land, the sale of a part precludes him from giving a complete release—except as against himself and any land still in his hands: *Keates v. Lyon* (1869) 4 Ch. App. 218; *Rogers v. Hosegood* [1900] 2 Ch. 388, 398; *Osborne v. Bradley* [1903] 2 Ch. 446, 454; *Kelly v. Barrett* [1924] 2 Ch. 379, 390. *Aliter* if the covenant gives him full power to do so, *semble*, as is usual in 'building schemes'; see also *Zetland v. Driver* [1937] Ch. 651, 658 (a covenant may be so framed as to run until a specified event).

⁴ *Re Ballard's Conveyance* [1937] Ch. 473, 482; *Rogers v. Hosegood* [1900] 2 Ch. 388, 395. The covenantor is therefore free to release it (unless he has assigned it specifically with the land): *Reid v. Bickerstaff* [1909] 2 Ch. 305, per Cozens-Hardy M.R. at p. 320.

⁵ See *post*, § 4, as to building schemes.

⁶ *Rogers v. Hosegood* *supra*, per Farwell J. at p. 394. See also arguments of Counsel *ibid.* p. 401; *Dyson v. Forster* [1909] A. C. 98, 100.

⁷ *Reid v. Bickerstaff* [1909] 2 Ch. 305, C. A. 320.

⁸ Judicature Act, 1873, s. 25 (6), replaced by Law of Property Act, 1925, s. 136. If as has been said (*Torkington v. Magee* [1902] 2 K. B. 427, 430), the enactment applies only to a right which the common law did not regard as assignable, it may be inapplicable to a covenant which touches or concerns land.

made.⁹ Thus, even the personal representatives of the original covenantee (who sue perforce as his assigns by operation of law¹⁰) cannot so enforce the covenant, even if it expressly mentions them, unless they have land which it was designed to benefit.¹¹ Our problem, therefore, is limited to the question whether a person who acquires land for the benefit of which a restrictive covenant has been made can enforce it without proving that it was originally annexed to that land.

It has been clear, for sixty years at least, that a purchaser of land may acquire from his vendor the benefit of existing restrictive covenants if he can prove affirmatively that they were included in the sale to him.¹² Although it is often said that he must be able to show that the benefit of the covenant was *expressly assigned* to him,¹³ the rule is hardly as strict as this. The judicial *dicta* indicate that it suffices if the vendor contracted or represented to him, in the negotiations which preceded his purchase of the land, that he would have with it the right to enforce the covenants.¹⁴ Probably the 'general words', ordinarily included (nowadays by statutory implication¹⁵) in a conveyance, are not strong enough to carry a covenant not already annexed to the land conveyed,¹⁶ at any rate if the purchaser is acquiring only a part of the covenantee's land.¹⁷

⁹ *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, C. A. 629, 630, takes this point as to assignees of the covenant (see further notes 14, 2, pp. 341, 339, *ante*).

¹⁰ *Formby v. Barker* [1903] 2 Ch. 539, C. A., *per* Romer L.J. (during argument) at p. 546.

¹¹ *Formby v. Barker*, *supra*; *Chambers v. Randall* [1923] 1 Ch. 149. Nor, *a fortiori*, can they assign the benefit of it: *Re Rutherford's Conveyance* [1938] W. N. 69.

¹² *Renals v. Cowlishaw* (1878), 9 Ch. D. 125, *per* Hall V.-C. at pp. 129–131. This much quoted judgment has been adopted with enthusiasm by many subsequent decisions—*e.g. ibid.* (1879) 11 Ch. D. 866, C. A.; *Spicer v. Martin* (1889) 14 App. Cas. 12 (where also it was said that the decision should not be extended).

¹³ *E.g.* throughout the judgments of Bennett J. and the Court of Appeal in *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611 (where there was in fact an express assignment; but other *dicta* there showed that it is not in fact so limited—see note 14, *post*); *Re Sunnyfield* [1932] 1 Ch. 79, 85; *Cheshire*, *op. cit.* 204.

¹⁴ *Renals v. Cowlishaw*, *supra*, at pp. 129, 130, 131; *Re Union Bank's Conveyance*, *Miles v. Easter*, *supra*, at pp. 628 (quoting Hall V.-C.), 632 ('independent transaction'), 638 ('in the contract of sale'); *Drake v. Gray*, [1936] Ch. 451, 455; *White v. Bijou Mansions*, [1937] Ch. 610, 622 (implying that a covenant may be assigned 'by implication').

¹⁵ See now Law of Property Act, 1925, s. 62.

¹⁶ 'It may well be that the right to sue thereon cannot be said to belong, or to be reputed to belong, thereto; but I express no final opinion on this point'—*per* Farwell J., *Rogers v. Hosegood* [1900] 2 Ch. 388, 398.

¹⁷ Apparently the fact that the purchase includes the whole of the land may help to raise an inference that the vendor intended the benefit of the covenant to pass with it; *Renals v. Cowlishaw*, *supra*, *per* Hall V.-C. at pp. 129, 130; *Reid v. Bickerstaff* [1909] 2 Ch. 305, *per* Buckley L.J. at p. 325. See also note 20, *post*.

But an express assignment is obviously unnecessary to enable a covenantee's personal representatives to enforce the covenant after his death, if they have the land concerned, for both his contractual rights and his land devolve automatically upon them by operation of law.¹⁸

In 1933, the rules which determine whether a covenantee's successor in title can sue as an express assign of the covenant were stated and, it would seem, augmented by the Court of Appeal in *Re Union of London and Smith's Bank, Ltd.'s Conveyance, Miles v. Easter*¹⁹: (i) even though the covenant expressly includes 'assigns' of the covenantee, his assignee cannot enforce it unless it was originally made for the benefit of land then held by the covenantee; (ii) this land must be capable of being benefited by the covenant; (iii) it must be possible to ascertain, with reasonable certainty, the identity and area of the land thus intended to benefit; (iv) the assignee, seeking to enforce the covenant, must have this land or part of it²⁰; and (v) he must show (a) that the benefit of the covenant was part of his purchase when he bought his land, or alternatively, perhaps, (b) that the covenant was assigned to him at a later date, at which time the covenantee still held part of the land concerned.²¹

A striking feature of these rules, and particularly of the first four of them, is their similarity to the rules which decide whether the benefit of a covenant is so annexed to land as to run with it automatically.²² They clearly involve the first requisite of

¹⁸ See the decisions of Sargant J. in *Ives v. Brown* [1919] 2 Ch. 315, and *Northbourne v. Johnston* [1922] 2 Ch. 309, as explained by him in *Chambers v. Randall* [1923] 1 Ch. 149, 159, and by the Court of Appeal in *Re Union Bank's Conveyance, Miles v. Easter* [1933] Ch. 611, 633, 634. See, further, note 26, *post*.

¹⁹ [1933] Ch. 611, at pp. 629-638.

²⁰ Romer L.J. delivering the judgment of the Court, stated (*ibid.* at p. 630) when dealing with express assignments, that equity here permits assignments to 'persons to whom the benefit of the covenant could not have been assigned at law. For at law . . . it would have to be assigned as a whole or not at all'. Whether this means that even the common law allowed express assignment with the whole of the land, or merely that statutory assignments of a chose in action must comprise the whole of it (*ante*, note 60), is not clear.

²¹ The rule is so stated (*ibid.* at p. 632, 638); but the reasoning on which it is founded (pp. 632, 633) suggests strongly that a subsequent assignment, not in pursuance of any undertaking given at the time of the sale, would be ineffective even if the covenantee was still possessed of some of the land. The question in the case was whether Easter, to whom the covenantee had purported to assign the benefit of two separate restrictive covenants by separate assignments, could enforce the restrictions: held (1) the assignment of the first covenant failed on grounds (ii) and (iii), and probably failed also on ground (v) (a); (2) the assignment of the second covenant failed on ground (v), the covenantee having previously disposed of the whole of his land (a similar decision is *Re Rutherford's Conveyance* [1938] W. N. 69).

²² *Ante*, § 2.

annexation—*viz.* that the original covenantee must have at the time of the covenant land to which it relates and that he or his assigns must have that land, or part of it, when attempting to enforce the covenant (see (i) and (iv) above). They also appear to satisfy the second requisite of annexation—*viz.* that the covenant must ‘touch or concern’ the land in question: indeed the test of increased value, which figures so prominently in cases on annexation, is precisely the test which is applied in these cases on assignment (see (ii) above).²³ It is the third requisite of annexation—that the covenant properly construed, must clearly show that it was intended to run with the land—that reveals the real difference between covenants that run and those which must be assigned. To some extent, even here, the rules coincide; for both annexation and assignment (see (iii) above) require that the covenant, construed in the light of surrounding facts, sufficiently defines the land which it intends to benefit.²⁴ But, whereas annexation requires of the covenant words and facts which indicate or imply that the covenant is to attach to the land at once, something less than this will suffice to make the covenant assignable. If the covenant, properly construed, shows that its primary purpose was to enable the vendor to dispose of his land to greater advantage—e.g. to increase its value in case he decides to sell it for building purposes—equity holds that, although this does not amount to immediate annexation, the covenantee can, on selling the land or part of it, assign therewith the benefit of the covenant. This appears to be an

²³ In *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, Romer L.J. delivering the judgment of the Court, analysed the cases, and proceeded (at p. 631): ‘It is plain, however, from these and other cases, and notably that of *Renals v. Cowlishaw*, that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, that covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject, however, to certain conditions. In the first place, the “other land” must be capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. . . .’

²⁴ James L.J. in *Renals v. Cowlishaw* (1879) 11 Ch. D. 866, 868, appears to state this as a general rule applicable to all assignees, whether of the land or of the covenant (he was perhaps thinking only of annexation). Bennett J. in *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, 625, applied his *dictum* to express assignments; but the Court of Appeal (*ibid.* 632) applied only *dicta* from other cases: ‘in the next place, this land must be “ascertainable” or “certain”, to use the words of Romer and Scrutton L.JJ. respectively’ (i.e., in *Formby v. Barker* [1903] 2 Ch. 539, 554; *L. C. C. v. Allen* [1914] 3 K. B. 642, 672). Surrounding circumstances are ordinarily taken into account in construing a document: see *ante*, § 2, 3rd rule.

invariable test for an assignable covenant,²⁵ as opposed to a covenant which attaches at once to the land; but in no decision as yet (so far as the writer is aware) has a plaintiff, suing by virtue of such ²⁶ an assignment, proved his case.

As was said by Bennett J., in 1933,²⁷ the law on this topic is still, perhaps, in course of development. In particular, the precise results of an effective assignment are not yet entirely clear. Such *dicta* as there are on the point indicate that it operates (or may operate if so intended) not merely to pass the benefit to the assignee, but, further *to annex the covenant to his land*.²⁸ And, since the Courts have held that a power to assign can only exist in order to increase the saleable value of the land,²⁹ that is the result one would expect.

If this is indeed the law, and assuming that the foregoing analogy between the rules for annexation and the rules for assignment is sound, an opportunity of simplifying the whole of this subject is at hand. The only restrictive covenants capable of being assigned³⁰ are those which are capable of running with the land: the only distinction between those which run unaided and those which require to be assigned is that the words and circumstances of the former show that immediate annexation was intended, whereas the latter show an intention to run only if and when the covenantee disposes of his land and indicates that they are to do so. It seems highly probable that

²⁵ Hall V.-C. in *Renals v. Cowlshaw* (1878) 9 Ch. D. 125, at pp. 129, 130 (quoting from *Master v. Hansard* 4 Ch. D. 724) gave this as the test (he said also, at p. 129, that the fact that a plaintiff has acquired the whole of the land may be important; but this was evidently directed to the more general question whether the covenant was intended to run, or to be assignable, with a mere part of the land). See also *Ives v. Brown* [1919] 2 Ch. 315, 323; *Chambers v. Randall* [1923] 1 Ch. 149, 156; *Re Union Bank's Conveyance*, *Miles v. Easter*, *supra*, C. A. at pp. 631, 632.

²⁶ Apparently the only cases of successful assignees are *Ives v. Brown*, *supra* (personal representatives of covenantee, *i.e.* assigns by operation of law), and *Northbourne v. Johnston* [1922] 2 Ch. 309 (trustees of land for A, sold part, taking a covenant; then conveyed the remainder to A; A died, leaving X her executor and devisee; trustees assigned covenant to X). As to them, see note 18, p. 358, *ante*.

²⁷ *Re Union Bank's Conveyance*, *Miles v. Easter* [1933] Ch. 611, 621.

²⁸ *Rogers v. Hosegood* [1900] 2 Ch. 388, C. A., *per* Collins L.J. at p. 408: 'When there is no indication in the original conveyance, or in the circumstances attending it, that the covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land'. The same is clearly implied by Hall V.-C. in *Renals v. Cowlshaw*, *supra*, at p. 131; and by Cozens-Hardy M.R. in *Reid v. Bickerstaff* [1909] 2 Ch. 305, 320 (quoted in *Millbourn v. Lyons* [1914] 2 Ch. 231, C. A. 243). See, further, note 31, *post*.

²⁹ *E.g.* *Re Union Bank's Conveyance*, *Miles v. Easter*, *supra*.

³⁰ This ignores, of course, assignments of the purely legal right to sue the original covenantor for damages. Such assignments may conceivably be divorced from the covenantee's land. But see note 8, p. 356, *ante*.

this is good law already.³¹ But as yet there has been no unequivocal judicial statement that it is so.

(4) *Purchasers of Land comprised in a 'Building Scheme'.*

When developing a building estate, it is often important both to impose upon the purchaser of each plot restrictive covenants which will preserve the amenities of the whole estate, and to be able to assure each purchaser that all occupiers of other plots are under similar covenants which he and his successors will be able to compel them to observe. For this purpose it is not enough that the promoter of the scheme obtains from each purchaser covenants which will attach to the plots, as yet unsold, which are still in his hands; those which he has already sold equally need the benefit of the covenants.

In early days, the desired result was obtained, it seems, by means of a 'mutual deed of covenant', executed in turn by all original purchasers and stating expressly that each was to have the benefit of the others' covenants.³² But this device though convenient when the sales were simultaneous (*e.g.* a sale of the plots by auction), was less so when a substantial period was likely to elapse between successive sales.³³ Moreover, equity is notoriously unwilling to see any special efficacy in a deed.³⁴ The Courts of Equity therefore decided that whenever land is laid out in lots for sale as building plots,³⁵ and each purchaser enters into restrictive covenants, the benefit of each purchaser's covenants can run with the other lots, whether there is a mutual

³¹ That identical facts may enable a covenant both to run and to be assignable is shown by the recent case *Zetland v. Driver* [1937] Ch. 651, 658, in which Bennett J. held that a restrictive covenant can, if so expressed, run with the land until a prescribed event (*e.g.* sale) occurs, and thereafter pass with the land only if expressly assigned. There is, perhaps, no unequivocal authority that the rules coincide. But the benefit of a covenant in a 'building scheme' (*post*) is said to pass by implied assignment to a purchaser from the covenantee (*Elliston v. Reacher* [1908] 2 Ch. 374, 385, *per* Parker J.; see note 42, *post*); and here it undoubtedly runs with the purchaser's land (*e.g. ibid.* at p. 392).

³² *E.g. Whatman v. Gibson* (1838) 9 Sim. 196; *Coles v. Sims* (1853) Kay 56. See *Keates v. Lyon* (1869) 4 Ch. App. 218. In *Elliston v. Reacher* [1908] 2 Ch. 374, 665 C. A., a mutual deed of covenant was intended to be used, and a specimen copy shown to each purchaser, but it was never executed.

³³ In fact the Real Property Act, 1845, s. 5, removed the difficulty as regards plots previously sold; for, thereafter, each purchaser could covenant 'with the owners for the time being' (without naming them as parties) of such plots (*ante*, § 2). But this was not fully realized until *Dyson v. Forster* [1909] A. C. 98, by which time special rules had been developed for building schemes to meet the difficulty.

³⁴ See note 41, *post*.

³⁵ A 'building scheme' may equally arise where the plots were leased (*Spicer v. Martin* (1889) 14 App. Cas. 12; *Pearce v. Maryon-Wilson* [1935] Ch. 188), or where the plots have already been built upon (*Torbay Hotel v. Jenkins* [1927] 2 Ch. 225). And even if there is technically no 'building scheme', the surrounding facts may justify analogous treatment (see *Rogers v. Hosegood* [1900] 2 Ch. 388, 397 and cases there cited).

deed of covenant or not. All that is necessary is that the Court should be satisfied 'that it was the intention that each of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers'.³⁶

The real peculiarity of the facts which raise a 'building scheme' is that they are facts which, when disclosed to a prospective purchaser of a plot of the land, are themselves a warning to him that the covenants to be extracted from him are intended for the benefit of all the other plots within the scheme, and that he in turn will get with his plot the benefit of similar covenants made by other purchasers. Thus, without entering into a detailed examination of the facts which equity requires to be proved in order to show that such a scheme exists,³⁷ it is at once apparent that a plan of the area concerned, indicating precisely the lots into which it is to be divided (and perhaps stating which lots have already been sold) is the obvious way³⁸ of warning each purchaser that these other plots are being sold by the vendor under a common scheme. With this will be needed some indication (perhaps endorsed on the plan itself) that all the purchasers are to enter into similar covenants,³⁹ and, if such is the case, that the vendor reserves a right to exempt unsold lots from the scheme—or even to release purchasers from their covenants.⁴⁰ If, before he buys a plot, each purchaser from the

³⁶ *Renals v. Cowlishaw* (1878) 9 Ch. D. 125, 129, *per* Hall V.-C. (summarizing the effect of previous decisions); quoted with approval in *Spicer v. Martin* (1889) 14 App. Cas. 12, 23-24.

³⁷ See *Elliston v. Reacher* [1908] 2 Ch. 374, 384, for the classic statement of the four essentials of a building scheme (summarized Cheshire, *op. cit.* 306). 'If these four points be established I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor *irrespective of the dates of their respective purchases*'—*per* Parker J. *ibid.* For the distinction between a building scheme and a mere building agreement, see *Kelly v. Barrett* [1924] 2 Ch. 379 (particularly the judgment of Sargant L.J.).

³⁸ The cases suggest that the production of such a plan is almost essential. Many failures have turned on the lack of an adequate plan; e.g. *Osborne v. Bradley* [1903] 2 Ch. 446; *Reid v. Bickerstaff* [1909] 2 Ch. 305; *Kelly v. Barrett* [1924] 2 Ch. 379; *Torrey Hotel v. Jenkins* [1927] 2 Ch. 225. 'Nor would it be reasonable for me to draw the inference that a person coming in and buying intends to be bound to an unknown number of unknown persons in respect of an estate which, so far as it has been sold, is undefined'—*per* Farwell J., *Osborne v. Bradley*, *supra*, at p. 453.

³⁹ In *Elliston v. Reacher*, *supra*, each prospective purchaser was given a copy of the sale plan, on which the common covenants were endorsed (and of a proposed mutual deed of covenant which contained them, but which was not in fact executed by the purchasers). The covenants need not be identical throughout the scheme (*Reid v. Bickerstaff*, *supra*, at p. 319), so long as each purchaser is fully informed of this (*White v. Bijou Mansions* [1938] W. N. 88, C. A.).

⁴⁰ The vendor need not himself make covenants with the purchaser as to plots still unsold (*Nottingham Patent Brick Co. v. Butler* (1886) 16 Q. B. D. 778, 784). Nor does a dispensing power, or power to release, invalidate the

common vendor is shown such a plan and understands that there is to be throughout the area a common system of restrictive covenants which are obviously beneficial to the plots comprised in it, equity will readily infer from the circumstances that each purchaser intended his covenants to enure for the benefit of all the other plots. In other words, the facts will show him that all the plot-holders will have a common interest in maintaining the restrictions: and, as was said by Lord Macnaghten, 'this community of interest necessarily requires and imports reciprocity of obligation'.⁴¹

The precise principles which underlie equity's attitude to building schemes have not received much attention in recent years. The Courts are inclined merely to inquire whether the facts of the particular case before them amount to a 'building scheme' as defined by the authorities, quoting, perhaps, the *dictum* of Lord Macnaghten,⁴² or stating that some indication must be found that mutual obligations were intended to arise between the purchasers *inter se*.⁴³ There is an undoubted tendency to regard the 'building scheme' decisions as purely equitable phenomena.⁴⁴ Yet it is evident that equity, even

scheme: see *Elliston v. Reacher*, *supra*, C. A. at pp. 672, 674 (where Farwell L.J. resiled from his apparent opinion in *Osborne v. Bradley*, *supra*, to the contrary); *Ridley v. Lee* [1935] Ch. 591, 602. Unless expressly reserved in every sale, the vendor under a building scheme has no such power (*Pearce v. Maryon-Wilson* [1935] Ch. 188, 192). The fact that a single purchaser buys several lots is no objection: *Elliston v. Reacher*, *supra*, at pp. 672, 673.

⁴¹ *Spicer v. Martin* (1889) 14 App. Cas. 12, 25. See also *Elliston v. Reacher*, *supra*, at pp. 384, 385; *Reid v. Bickerstaff*, *supra*, at pp. 319, 323. Moreover, such a purchaser may be bound in equity by the covenants in the scheme of which he was aware, although he does not (the vendor having no dispensing power) expressly undertake them in his purchase deed: *Knight v. Simmonds* [1896] 1 Ch. 653; 2 Ch. 294; *Rowell v. Satchell* [1903] 2 Ch. 212. This follows from equity's attitude to a deed, see notes 24, 25, pp. 359—360, *ante*.

⁴² Parker J. in his famous judgment in *Elliston v. Reacher* [1908] 2 Ch. 374, at p. 385, said that equity's intervention 'has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase [*sic*] is in equity an assign of the benefit of these covenants'. He evidently preferred the latter alternative, for, as he explained, the implication of mutual contracts can hardly prevail unless the various sales are simultaneous. But he concluded as follows: 'It is, I think, enough to say, using Lord Macnaghten's words in *Spicer v. Martin*, that when the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.'

⁴³ *E.g.* *Nottingham Patent Brick Co. v. Butler* (1886) 16 Q. B. D. 1778, C. A. 784; *Osborne v. Bradley* [1903] 2 Ch. 446, 454; *Elliston v. Reacher*, *supra*, C. A. at p. 671; *Reid v. Bickerstaff* [1909] 2 Ch. 305, C. A. 319, 323, 324; *Kelly v. Barrett* [1924] 2 Ch. 379; 394, C. A. 398, 406, 409, 414; *Torbay Hotel v. Jenkins* [1927] 2 Ch. 225, 240.

⁴⁴ See *e.g.* *Torbay Hotel v. Jenkins*, *supra*, at p. 240, where Clauson J. clearly indicated that equity is exercising (in contrast with its concurrent jurisdiction in ordinary cases of annexation) a purely exclusive jurisdiction.

here, is following the law to a large extent. This is clearly revealed in its methods of ascertaining whether the benefit of each purchaser's covenants was intended to attach to the other plots. Even at law, the words of the covenant should, for this purpose, be read in the light of surrounding facts.⁴⁵ In this respect, therefore, the 'building scheme' decisions are peculiar only in that here the surrounding circumstances are so much more enlightening and important than in ordinary cases of annexation.⁴⁶

Some *dicta* have suggested that equity goes farther in these cases than the law would go, in that the benefit of a purchaser's restrictive covenants under a building scheme attaches both (1) to unsold plots retained, as yet, by the vendor, and (2) to plots which the vendor has already sold.⁴⁷ But the former of these achievements is equally possible in ordinary cases of annexation; for so long as a covenant, read in the light of surrounding facts, shows that the benefit of it was intended to run with every part of the land retained by the vendor, it can so run even at law.⁴⁸ And even if the covenant is not at once annexed to his land, the ordinary rules permit him, on selling a part of it, to annex the covenant thereto expressly or by representation to the purchaser, if (as is abundantly evident when a building scheme exists) the covenant, construed with the facts, contemplated this result.⁴⁹ What, then, of the second alleged peculiarity of a building scheme? Do the ordinary rules of annexation permit this also? Here again the answer must be yes. The fact that a person is not expressly named in a covenant does not, since the Real Property Act, 1845,⁵⁰ preclude him from suing thereon as an original covenantee; nor does it prevent the covenant from running with his land—given in each case that the covenant

⁴⁵ *Ante*, § 2, 3rd rule as to annexation.

⁴⁶ In *Rogers v. Hosegood* [1900] 2 Ch. 388, both Farwell J. (at p. 397) and the Court of Appeal (at p. 408) treated the building scheme as a mere illustration of the general rule that a deed should be construed in the light of its surrounding circumstances. See also *Kelly v. Barrett*, *supra*, when the judgments of the Court of Appeal concentrated upon the effect of the documents so construed. Also *Nottingham Patent Brick Co. v. Butler*, *supra*, where Lord Esher M.R. (p. 784) said that the question whether the purchasers were intended to be bound *inter se* 'must be determined by the same rules of evidence as every other question of intention'.

⁴⁷ See the quotation (particularly the words italicized) from Parker J. given *ante*, note 37, p. 362, also *Nottingham Patent Brick Co. v. Butler* (1886) 16 Q. B. D. 778, 784, where Lord Esher M.R. stated, as though it is a characteristic peculiar to building schemes, that 'a Court of Equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so without introducing the vendor into the matter'.

⁴⁸ A strong illustration of the effect of surrounding circumstances in ordinary annexation is *Drake v. Gray* [1936] Ch. 451, C. A. See also note 45, *supra*.

⁴⁹ See *ante*, § 3.

⁵⁰ Section 5; now L. P. A. 1925, s. 56. See, further, § 1, *ante*.

clearly intends these results.⁵¹ Here again, therefore, the peculiarity of a building scheme is not that former purchasers can claim the covenant, but that the Court will hold that surrounding facts (the existence of the scheme and the evident intention to create reciprocal obligations throughout its area) permit the covenant to be read in a wider sense than its bare words would do.⁵²

The reason why the Courts do not now delve more deeply into the equitable principles which underlie the 'building scheme' is clear enough. It is abundantly evident, when covenants are made in such circumstances, that they must have been intended to protect every plot within the scheme: the House of Lords has held⁵³ that this intention must prevail: consequently such facts themselves suffice to found a judgment that the benefit of each purchaser's covenant is annexed to every other plot comprised in the scheme. Whether such annexation derives (1) from a somewhat generous interpretation of the legal rules which decide who may be numbered among the original covenantees, and with what land a covenant is intended to run, or (2) from an immediate annexation to plots previously sold, followed by inferred assignments (with annexation) when the vendor sells the plots remaining, the Courts do not now need to state.⁵⁴ Nor, as a rule, is it necessary to inquire whether the common vendor is, in some sort, a trustee for present and future plot-holders when he takes a covenant from a purchaser.⁵⁵ It

⁵¹ *E.g. Forster v. Elvet Colliery* [1908] 1 K. B. 629, C. A.; *ante*, note 30, p. 344.

⁵² Even the existence of the scheme may be sufficiently proved by inference from surrounding facts, in the absence of direct evidence (from documents or statements by the vendor) on the point: *Kelly v. Barrett* [1924] 2 Ch. 379, 399, *per* Pollock M.R.

⁵³ See note 41, p. 363, *ante*.

⁵⁴ Parker J. in *Elliston v. Reacher* [1908] 2 Ch. 374, 385 (*ante*, note 42, p. 363) evidently preferred (2); see also various *dicta*, quoted in *Re Birmingham Land Co. and Allday* [1893] 1 Ch. 342, to the effect that the vendor exacts the covenant in order to raise the saleable value of other plots. Cozens-Hardy M.R. in *Reid v. Bickerstaff* [1909] 2 Ch. 305, 319, perhaps supports (1): 'each purchaser became under an implied covenant or obligation to every other purchaser to conform to and obey the provisions of the scheme.' The judgments in *Rogers v. Hosegood* [1900] 2 Ch. 388, and in other cases (see note 43, p. 363, *ante*) appear to be equally consistent with either.

⁵⁵ Indications that the original vendor is in some sense a trustee of the benefit of the covenant are (i) *dicta* suggesting that he cannot, unless the scheme reserves him the power, sell subsequent plots without imposing upon them the restrictions contemplated by the scheme (see *Ridley v. Lee* [1935] Ch. 591, 602; *Elliston v. Reacher*, *supra*, at pp. 389, 672)—but this probably rests merely on an implied term, enforceable by injunction, in his contract with previous purchasers (*Mackenzie v. Childers* (1890) 43 Ch. D. 265; *Re Birmingham Land Co. and Allday*, *supra*); (ii) the assumption that he can enforce the covenants, on behalf of the area as a whole, even after he has disposed of the whole of the land (this was apparently assumed in *Kelly v. Barrett* [1924] 2 Ch. 379; but plaintiffs failed to establish a building scheme; *Tomlin J. in*

is enough that the covenant and the circumstances in which it was made together show that each plot was intended to have the benefit of it.

A celebrated classification of restrictive covenants may serve as the basis for some final generalizations. 'Negative covenants in conveyances in fee restricting the rights of the purchaser to use the land may be considered as falling under three classes: (i) where the covenant is entered into for the vendor's own benefit; (ii) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; and (iii) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers, as part of a building scheme.'⁵⁶

In (i) the covenantee's assigns, whether of his land or of the covenant, cannot enforce the covenant against assigns of the restricted land. In (ii) assigns of all or a part of the covenantee's land can enforce the covenant if, read in the light of its surrounding facts, it reveals that this was intended: but if, on construing the words and facts, the apparent intention was to leave the covenantee to decide whether the covenant should or should not pass with his land, the assigns of his land can enforce it only if they can show that he assigned it with the land—whereupon, it will probably follow that the covenant is now finally annexed thereto. In (iii) the facts known to the covenantor when he made the covenant show conclusively that the right to enforce it was intended to attach to every other plot of land comprised in the scheme. Equity, therefore, reading the covenant in the light of these surrounding circumstances, applies to it rules analogous to (ii), above, and holds that it is annexed to every plot.

argument appeared to imply it, *ibid.* at p. 389); (iii) he can enforce the covenants without proving that any plots remaining in his hands can benefit from them, or at least the onus is on the defendant to prove the contrary, so long as they benefit the area as a whole (*Northbourne v. Johnston* [1922] 2 Ch. 309); (iv) a purchaser's covenant may be annexed, perhaps, even to other plots which he himself has bought or subsequently acquires (*Elliston v. Reacher* [1908] 2 Ch. 665, C. A., 672, 673, shows that this does not vitiate the scheme as a whole; *aliter, semble*, if joint vendors sell plots to one of themselves—*Ridley v. Lee*, [1935] Ch. 591).

⁵⁶ *Osborne v. Bradley* [1903] 2 Ch. 446, 450, *per* Farwell J.

JURY TRIAL TO-DAY.

R. M. JACKSON.

JURIES are divided into juries of presentment and juries of issue; this paper is concerned with the latter kind, commonly called trial juries. Modern writers are singularly chary of committing themselves to any opinion about juries. The eulogies of Blackstone¹ are definitely unfashionable. The current opinion is perhaps on these lines: jury trial in civil cases is sometimes satisfactory and sometimes most unsatisfactory, and hence the restriction of jury trial has been a wise development²; however, there is much to be said for jury trial in criminal cases and (in the past at least) in cases where the liberty of the subject is concerned. If juries have in the past protected persons against political oppression, and if the conditions under which they did so are still existing or reasonably possible, then we have a point of such importance that it should receive priority in discussion.

In the late eighteenth century we get many professions of enthusiasm for trial by jury. Lord Camden said: 'Trial by jury is indeed the foundation of our free constitution; take that away, and the whole fabric will soon moulder into dust. These are the sentiments of my youth,—inculcated by precept, improved by experience, and warranted by example.'³ When Erskine was made Lord Chancellor in 1806 he took 'Trial by Jury' as his motto, although it was said that 'By Bill in Equity' would be more suitable for the Woolsack.⁴ Erskine was so enthusiastic about juries that Lord Byron, after sitting next to Erskine at dinner and hearing about little else, felt that juries ought to be abolished.⁵ Lord Loughborough, before his

¹ Bl. Comm. iii, 379; iv, 343.

² The writer has described the decline in jury trial, 1 Modern Law Rev. pp. 132 *et seq.* The mode of trial in civil cases is settled by rules made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (1) (h), which apparently gives power to take away any rights to a jury: *Kodak, Ltd. v. Alpha Film Corporation, Ltd.* [1930] 2 K. B. 340. The writer, in 1 Modern Law Rev. 141, doubts the accuracy of this view. It should be noted that restriction in jury trial in the King's Bench Division was made by statute (Administration of Justice (Miscellaneous Provisions) Act, 1933), and not by rules made under the Judicature Act of 1925.

³ Campbell, *Lives of the Lord Chancellors*, 5th ed. vol. vii, 35.

⁴ Campbell, *op. cit.* viii, 376.

⁵ Campbell, *op. cit.* ix, 94.

appointment as Lord Chancellor, declared that: 'Judges may err, judges may be corrupt. Their minds may be warped by interest, passion, and prejudice. But a jury is not liable to the same misleading influences.'⁶ Even Lord Eldon, when he was Solicitor-General and found that for political reasons he could not oppose Fox's Libel Bill, began his speech 'by professing a most religious regard for the institution of juries, which he considered the greatest blessing which the British Constitution had secured to the subject'.⁷ The older constitutional law books are in the same tradition.⁸ In two more recent works, intended for a wider range of readers, we get stress on the past value of juries.⁹ Modern books on constitutional law, such as Wade & Phillips, make no comments upon jury trial.

The assertions that have been made can be tested against decided cases. If all the cases cited in Wade & Phillips, Constitutional Law, in the section on the Citizen and the State, are examined, it will be found that juries played an insignificant part. *First*, the Divisional Court of the King's Bench Division seems the most important Court, whether for prerogative writs, appeals by case stated from summary Courts, appeals from quarter sessions, or (until recently) appeals from county courts. These functions have always been exercised without juries. *Second*, where a jury was used, the jury either (a) answered questions so put that the jury cannot have known in whose favour they were finding, or (b) followed the judge's opinion. In *Harrison v. Rutland*¹⁰ the jury disregarded the judge's directions, and the Court of Appeal preferred the jury's view to that of the trial judge. Even in the General Warrants Cases, the juries played no conspicuous part. In *Wilkes v. Wood* (1763)¹¹ the jury found for the plaintiff and it is clear that the judge wanted the jury to do so. In *Leach v. Money* (1765)¹² the real argument was on a writ of error, whilst in *Entick v. Carrington* (1765)¹³ the jury found a special verdict, which is perilously near to shirking their job. In the two latter cases the defence was a special justification, with replication *de*

⁶ Campbell, *op. cit.* vii, 400.

⁷ Campbell, *op. cit.* ix, 189.

⁸ 'When questions evolved by political agitation are raised between the subject and the crown . . . it is conceived that, by the wit of man, no system could be devised more fitter' than jury trial: Broom, Constitutional Law (1885), pp. 156-7.

⁹ Article on Jury in Encyclopaedia Britannica, 11th ed. (1911), and Jenks, Book of English Law (1936), pp. 97 and 167.

¹⁰ [1893] 1 Q. B. 142.

¹¹ 19 State Trials 1153.

¹² 19 State Trials 1002.

¹³ 19 State Trials 1030.

iniuria, a form of pleading that is famous for the confusion that it caused.¹⁴

Cases reported for their legal interest are not a fair sample of the cases that come before the Courts. Pleasant chatty reports like Howell's State Trials give us a better indication, for we get all the political trials worth noting, irrespective of their legal interest. Many of these were sedition trials. Dr. Jenks points out that the vagueness of sedition is 'a danger to the liberty of the subject. . . . Happily, in the days when this danger was greatest, the sturdy independence of juries was a real safeguard against oppression, and a strong justification of the jury system.'¹⁵ I have examined many of the late eighteenth century trials for seditious libel, and failed to find any justification for this view. In reading these cases I found it quite impossible to predict what the jury was going to do; for every acquittal there was a conviction to balance it. In 1792 Paine¹⁶ was convicted for publishing the Rights of Man, whilst in 1793 his publisher Eaton¹⁷ was virtually acquitted. The jury found Eaton 'guilty of publishing'; the judge pressed the jury to alter their verdict, but all the jury would agree to do was to alter it from 'Guilty of publishing' to 'Guilty of publishing that book'. As Fox's Libel Act had been passed, the effect was an acquittal. Poor Daniel Holt¹⁸ was convicted in 1793, and completely ruined, for publishing suggestions for mild reform of the franchise and parliamentary constituencies, whilst the case of John Reeve¹⁹ in 1796 is a standing warning of the danger of knowing too much legal history. The list could be continued. The only cure for admiration of these juries is to read the State Trials, and ponder over the possibility that if the printer put 'guilty' when he meant 'not guilty' and *vice versa*, you would not have noticed anything odd.

The explanation appears to lie in the qualification of jurors and mode of selecting a jury. Special juries could be ordered in all common law Courts for civil or criminal cases other than treason or felony.²⁰ Sedition trials, being for misdemeanour, were usually tried by special juries. The qualifications of

¹⁴ Sutton, Personal Actions at Common Law, 90—91; Dialogue on Crogate's Case, Holdsworth, History of English Law, ix, 417.

¹⁵ Book of English Law (1936), 167.

¹⁶ 22 State Trials 357.

¹⁷ 22 State Trials 754, 786.

¹⁸ 22 State Trials 1189.

¹⁹ 26 State Trials 529.

²⁰ Doubts were set at rest by 3 Geo. 3, c. 25 (1730), repeated in Juries Act, 1825, s. 30.

special jurors have always been rather vague. The Juries Act, 1825, s. 31, was probably declaratory in prescribing that they must be of the rank of esquire or higher degree, or be merchants or bankers. To get the panel, the sheriff attended before a Master of the Court, who selected forty-eight names from the list of special jurors. In criminal informations filed by the Attorney-General, the Master of the Crown Office selected the names, and 'he was not bound to take the jurors as they occurred upon the Sheriff's books, but was to make a selection'.²¹ When the panel of forty-eight names had been selected each party proceeded to strike out names, one at a time, alternately, until twenty-four names were left; these twenty-four special jurors later balloted to make the trial jury of twelve. By the Juries Act, 1825, s. 32, the forty-eight names were to be obtained by ballot. The Juries Act, 1870, ss. 16 and 17, provided that special jurors were to be selected from the panel by ballot, unless the Court ordered that a jury be 'struck' in the old style. A case shortly before the War illustrates the way in which 'striking a jury' might work. Mr. Lygon, M.P. (conservative) brought a libel action against Mr. Greenwood, M.P. (liberal) and a newspaper owned by Mr. Winfrey, M.P. (liberal). Mr. Lygon had said that he was against feeding school children out of the rates, and he was cited as being against feeding school children, the words 'out of the rates' being omitted, so that a fearsome *innuendo* arose. The Master ordered a special jury to be struck. The venue was Northamptonshire, so the sheriff of that county sent the special jury list to his London agent before whom the parties appeared and balloted for forty-eight names. Another appointment, a day later, was made for 'striking'. The plaintiff's solicitor at once set off for Northampton, followed by the defendant's solicitor, to find out the politics of the panel. The result showed thirty-five conservatives and thirteen liberals. The next day with 'unerring accuracy' the plaintiff struck out twelve out of the thirteen liberals, whilst the defendant said he objected to the twelve 'most violent Tories'. That left twenty-three conservatives and one liberal. At the assizes the one liberal got in on the ballot, and because he was a 'quiet, unobtrusive liberal . . . we got him foreman of the jury, and he brought down the verdict from £500 to £100 by sticking out'. Mr. Winfrey thought that thirty-five to thirteen was a fair average of conservatives to liberals on the special jury list. He looked at the Huntingdonshire list and

²¹ Tidd, King's Bench Practice, 9th ed. (1828), 789.

found it much the same.²² It will be noted that the ballot for the panel gave a fairly representative selection, but that the method of striking would always change the proportion. Had that particular panel been thirty-six conservatives to twelve liberals, the trial jury would have been all conservatives.

The Juries Act, 1922, abolished 'striking' (except under the Lands Clauses Consolidation Act, 1845), and this method of selecting jurors of the most convenient politics is now a thing of the past. To-day it will depend on the lot of the draw. What are the chances? Under the Juries Act, 1922, the Jurors' Book is made up by placing marks in the list of electors against the names of those who are qualified as jurors, 'J' for common jurors and 'SJ' for special jurors. A special juror must (1) be an esquire or of higher rank, or (2) be a merchant or banker, or (3) occupy a dwelling-house in the valuation list at not less than £100 in larger towns or £50 elsewhere, or (4) occupy premises of the annual value of at least £100, or £300 if it is a farm; the qualifications (3) and (4) were added by the Juries Act, 1870. A common juror must be (1) a £10 freeholder, or (2) a £20 long leaseholder, or (3) a householder in the valuation list of £30 in London and Middlesex or £20 elsewhere, or (4) occupy a house with not less than fifteen windows; qualifications (2), (3) and (4) are due to the Juries Act, 1825. Special provisions apply to the technical City of London.

Jury service is thus confined to the middle and upper classes. As a sample, I have taken a ward in Cambridge that consists partly of working class houses, old and new, and partly of middle class houses. There are just under 5,000 parliamentary electors and 3,500 local government electors; the list shows one special juror, and 187 common jurors, which works out roughly at one common juror to every 19 local government electors. It is only by some stretch of imagination that a working class prisoner can be said to be tried by 'twelve representatives of his countrymen'.²³ The views and prejudices of jurors are more apt to be those of the wealthier classes than those of the poorer classes. This is most apparent with special jurors. If a manufacturer and a trade union engage in litigation in which there is jury trial, the manufacturer would probably ask for a special jury,²⁴

²² Committee on Juries, Minutes of Evidence, Cd. 1913/6818, Questions 2579 *et seq.*

²³ Kenny, *Outlines of Criminal Law*, 15th ed. 564.

²⁴ Either party can ask for (and in practice get) a special jury; the rule is that the party who applies must pay the cost, £12 12s., unless the judge certifies that the case is suitable for a special jury, in which case the extra costs will be payable by whoever is ordered to pay the costs.

hoping, perhaps not in vain, that the merchants, bankers and wealthier persons on the special jury would hold 'sound' (*i.e.* manufacturers') views about trade unions.²⁵ In fact, if there is any reason to believe that the wealthier classes definitely support one political party rather than another, then we should expect that in political cases the jury would normally be favourable to one particular party. This is an over simplification. In the Cambridge ward mentioned above, various elections show a balance of five labour supporters to eight conservative supporters, whereas of the 187 jurors, ten are known to be labour, sixty-two are known to be conservative, and 115 have expressed no particular political allegiance.²⁶ It is true that the jurors appear to be far more conservative than the electors generally, but this is perhaps of less importance than the attitude of the 115 'doubtfuls'. Now Governments are put into power and driven out of office by the political 'doubtfuls'. My conclusion is that juries on the present qualifications must tend towards conservatism, but the major tendency is for a jury to be in sympathy with the party in power at the time of the trial. Under modern political conditions, civil liberties mean in practice the rights of minorities. If a modern jury protects a person against political oppression it probably means that the Government has blundered and offended mobile opinion, which is the very thing that a modern Government cannot afford to do. But since crime, and some civil actions, are tried locally, we may get an area that is X-ite when the country has voted Z-ite by a large majority. If a political trial in that area results in an acquittal of an X-ite, the verdict may mean: (1) the jury tried the case impartially, or (2) the jury was X-ite and loyal to its party, or (3) the jurors make their living by trading with the local X-ites, and feared that any other verdict would mean broken windows or a boycott of their trade. It is quite possible that jury trial can lead to more abuses than anything it is supposed to check.

If juries are to be representative it will be necessary to make the qualifications for jurors the same as for the parliamentary franchise, or perhaps the local government franchise. This would be a grievous burden upon working class people, unless we reversed our ancient habits and paid jurors for expenses and

²⁵ After trade unions had obtained a better legal standing in 1875, they turned their attention to advocacy of reform of the law, for they had suffered badly under the English legal system. The measures advocated included reform of the jury system: Webb, *History of Trade Unionism*, 1920 edn. p. 367.

²⁶ These figures were obtained by going through the records of canvassers at election times; those acquainted with the organization of election campaigns know that the estimate of votes definitely 'for' and definitely 'against' is reasonably accurate.

loss of time, and miraculously ensured that absence for jury service should never lead to dismissal by an employer. A general liability for jury service might, politically at least, be a wise step in a country that proclaims equality before the law. Further, if we are to believe those who tell us that jury service is good for the jurors, broadening their outlook and uplifting them by allowing them to share in the dispensing of justice, and that the stale air of the law is refreshed by contributions from the uncloistered life of jurors, it is surely a little unfair to keep the lesser ratepayers from any share in these good things.

An alternative course is to alter the qualifications of jurors, still keeping some qualification. The objectionable feature is the dominance of the property qualification; its only merit is administrative convenience. We ought at least to widen the basis, on some scheme that would include non-propertied people who are interested in the public welfare. Any experience of adult educational work demonstrates that intelligence may live in a house assessed at less than £20 a year. Nor, for the special jury list, do I find consolation in thinking that if I go on improving my house my rateable value will go up, and I may get marked in the list as a special juror. Definite proposals for reformed qualifications would involve a long discussion.

The alternative to trial by jury is trial by judge alone. Judges are probably quite as prejudiced as laymen, but most judges have by their training learned to suppress their prejudices, and even if they cannot, they know that they ought to do so. It is, I think, the opinion of some minorities to-day that a judge alone is a better tribunal for the protection of their rights than a jury. It is worth noting that *Elias v. Pasmore*²⁷ in 1934 was a non-jury case. It is not, however, possible to have political cases tried in a manner that differs from other cases, because no legal distinction can be drawn between political and non-political cases. On a charge of, say, malicious damage to property, the law applicable and the mode of proof is exactly the same whether it is an ordinary case or whether the damage was done by way of political demonstration.²⁸ To make any distinction in mode of trial for political cases would involve a wholesale change in common law principles.

²⁷ [1934] 2 K. B. 164.

²⁸ Prof. Laski, in 4 Howard Journal 260, regrets that our official Judicial Statistics do not distinguish 'political' crime; it is unfortunate that this information is not available, but I do not see how the Home Office could label cases as 'political' when a judge or the Home Secretary would, if the occasion arose, insist that the wrong in question was merely a common crime.

One curious point that may give trouble some day is the method of selecting the panel and the jury. The number of the panel is not fixed, but depends on the amount of work before the Court; the number commonly varies from thirty-six to sixty, but as many as 300 have been summoned.²⁹ The panel is summoned by the sheriff, which in practice means the under-sheriff or deputy. No rules govern the selection of names. In some areas tradition dictates that the sheriff shall follow some method. Thus in London the method has been to take two districts, geographically apart such as Hampstead and Wandsworth, and make up the panel by taking names alphabetically from each district, working through each list until it is exhausted. In some areas the panel has been described as being selected 'at random'.³⁰ The theory is that if a prejudiced panel is selected, the party aggrieved can challenge the array.³¹ In civil cases the trial juries are called from the panel by balloting, but in criminal cases they are called in the manner customary in that Court, balloting (as at the Old Bailey) being a frequent method. Next time we alter our jury law it might be wise to establish an automatic method of selecting the panel, and bring the calling of criminal juries into line with civil cases by making balloting the only method.

If it is agreed that juries perform no special and valuable function in political cases, then the future of juries must depend on their utility in ordinary cases. The abilities of judges and juries may be compared on two points:—

1. The problem of deciding whether a witness is to be believed or not.

Skill in estimating the characters of others depends to a considerable extent upon experience, provided that 'experience' means that conclusions are in some way tested. Most doctors ultimately *know* whether their patients have been telling the truth. College tutors also have to take responsibility for their estimates of character. Business men are also largely concerned with the same problem. When these people make mistakes they sooner or later know that they have made a wrong

²⁹ Halsbury, *Laws of England*, 2nd ed. vol. 19, p. 303; this large panel was summoned for the trial of Mile End Guardians in 1908. The proportion of women must equal the total proportion of women to men in the Jurors' Book.

³⁰ Report of Committee on Juries, Cd. 1913/6817, paras. 106, 107; Minutes of Evidence, Cd. 1913/6818, Questions 1155 *et seq.*

³¹ The fairness or otherwise of the panel can be considered beforehand, since the names (with occupations and addresses) are arranged alphabetically, and this list must be available for at least seven days before the sitting of the Court: Common Law Procedure Act, 1852, ss. 106, 107; Juries Act, 1870, s. 16. In practice challenges are very rare.

estimate. Now a judge, by the very nature of his office, is not accustomed to testing his conclusions. He can live in the firm conviction that he is a shrewd judge of character. To some extent as counsel, and almost certainly as judge, he will very rarely find out when he has been wrong. A man who never knows of his mistakes is apt to think that he is generally right. A judge does not always 'gain experience' on the problems of fact; he increases his self-assurance and his self-confidence. A learned judge has recently said that: 'The average English jury can understand most things which are put to them in plain language.' What this really means is that when a judge explains to a jury, say the distinction between false pretences and larceny by a trick, and the jury find a verdict in accordance with the judge's views, the judge deduces that the jury understood his plain language. No law teacher would make that assumption, because he tries to find out whether the plain language of lectures, text-books, and learned judges has been understood.

A special jury is likely to be composed, partly at least, of men who would fail in their business if they were not fairly accurate in their estimate of credibility. In cases involving fraud such juries may be far better than the judge. A common jury may or may not have any particular ability.

2. The application of common public opinion of sensible men.

In many cases this is irrelevant. 'You cannot have public opinion on questions arising on charterparties and bills of lading.'³² The two chief fields where this is needed are defamation and negligence actions.

The problem is really one of evidence. An epithet is defamatory because people regard it as such. Is this to be determined by judicial knowledge or by evidence? When pictures of well-known persons are used to advertise goods, is it commonly thought that such persons are paid for allowing their portraits to appear? In *Tolley v. Fry* we find Scrutton L.J., saying that 'A jury is certainly allowed to know something not in the evidence', whilst Greer and Slessor L.J.J., by saying that there was no evidence for the jury, implied that advertising habits are outside a jury's knowledge.³³ The House of Lords thought otherwise,³⁴ except

³² Committee on Juries, Minutes of Evidence, Cd. 1913/6818, Question 3640.

³³ [1930] 1 K. B. 467, Scrutton L.J. at 475, Greer L.J. at 481, Slessor L.J. at 491.

³⁴ [1931] A. C. 333, Lord Blanesburgh at 349, Viscount Hailsham at 339.

for Lord Blanesburgh, who said: 'Neither the belief nor its limitations were explored or made the subject-matter of evidence . . . neither could have been within the judicial knowledge of the judge or within the worldly experience of a Middlesex common jury.' The point was not whether persons whose portraits appear *are* paid, but whether the public *thinks* they are paid. Lord Blanesburgh thus objected to a jury acting without evidence, yet he was quite prepared to act without evidence in stating the worldly experience of others. As Viscount Hailsham said: 'It is always difficult to determine with precision the amount of judicial knowledge which is permissible to a judge or jury.' There is no more difficult task than the devising of a method for ascertaining what is common knowledge. Admittedly a jury is not a perfect method, but a random selection from the public at large is surely better than relying upon a select group such as the judges.

In negligence actions we get the complication that the standard of care may be assessed by common knowledge and practice, or by specialist knowledge and practice. Whether steel chains have been adequately inspected and tested must depend upon specialist evidence. When a pane of glass falls out of a garage door and injures a chauffeur, and a question arises as to the proper measure and periods of inspection of such a building, is this common knowledge or specialist knowledge? The Court of Appeal took the view that it was not common knowledge, Scrutton L.J. saying: 'I do not think a county court jury, who are not as a rule people who keep motor cars, are entitled to find without evidence what is the ordinary practice as to examination of a garage.'³⁵ The jury here must apparently weigh evidence that is given, and not apply their common knowledge, because garage doors with panes of glass are much more abstruse topics than other kinds of doors.

When our jury system appears to give queer results it may be found that one or more of the following points is involved:—

A. Putting a matter of common knowledge before the jury, and then disputing their verdict by denying that they have that knowledge. This is discussed above.

B. Expecting a jury to follow a long case without having any of the help that counsel and the judge rely upon. In *Mechanical etc. Co. & Lehwess v. Austin*³⁶ the trial lasted

³⁵ *Cole v. De Trafford* (No. 2) [1918] 2 K. B. 523, Scrutton L.J. at 538.

³⁶ [1935] A. C. 346, Viscount Sankey L.C. at 356, Lord Atkin at 370.

fourteen and a half days. In the House of Lords, Viscount Sankey L.C. said: 'If the jury had had the same advantages we have had, in this long and complicated case, of having such a transcript of the evidence before them and the whole of the correspondence under their eyes, they could not have arrived at the conclusion that the licence agreement was made.' Lord Atkin observed that: 'It can hardly be said that the jury lose sight of the documents, for they barely see them.' I believe that the sole reason for not supplying the jury with copies of documents is a relict of the days when juries were illiterate, and that such a curious practice is quite indefensible to-day. The cost would not be high. Counsel and the judge are supplied with 'top' copies of typewritten copies, so that a few carbon copies could be made for the jury. A transcript of evidence is more difficult. A shorthand note is cheap, but the transcript is expensive and it is often not made at all unless an appeal is entered. But in a long trial the note is often transcribed for each day, and when counsel find this indispensable it must surely be equally useful to the jury. It might in all cases be useful if the jury was entitled, before or during the consideration of their verdict, to call upon the shorthand writer to read out any of the evidence which the jury wished to hear again to refresh their memories.

C. Asking a jury to give positive answers to highly technical questions. A jury may be asked to answer any question of fact. A plea of justification in libel may result in a jury being asked to say whether a particular method of contraception is or is not harmful and dangerous,³⁷ although it is probably safe to say that with the data then available the question was unanswerable when tackled as a scientific problem.

In the long run our judicial system cannot afford to adopt methods that would appear ludicrous outside the Courts. We know that laymen cannot resolve matters upon which lawyers cannot agree. For medical questions we are getting nearer to a sensible technique, for judges now try to ensure that an agreed medical report is put before the Court. The Rules of the Supreme Court, since 1934, make provision for a Court expert to be appointed to report upon questions of fact or opinion, but this can only occur in non-jury cases. A suitable technique might be for the parties' experts to see if they can agree, with a Court expert to act as moderator, and if no

³⁷ *Sutherland v. Stopes* [1925] A. C. 47.

agreement can be reached the jury should, whenever possible, be exonerated from the burden of having to decide matters outside their competence. In personal injury cases it is necessary to arrive at some conclusion about the extent of the injuries, and if the experts cannot agree somebody must decide what is to be done. If a libel action arises because Mr. Z has stated that Mr. X's cancer cure is useless and dangerous, and the defence is justification, it is a curious course to ask a jury (or a judge) to pronounce upon the cure of cancer; it is, however, quite sensible to ask non-experts whether Mr. Z held that opinion honestly and whether he had reasonable grounds for that opinion.

D. It is questionable whether the amount of damages should be left to the jury as it is at present, or whether it should be left to the jury at all. The amount of damages is not a matter upon which a jury is likely to show any special ability, it does not depend upon estimate of character, nor to any large extent upon general knowledge. In libel cases the amount of damages given is becoming a grim joke. It may be far cheaper to maim a man for life by knocking him down with a motor car than to call him an ass, unless, of course, the Court of Appeal holds that there was no evidence upon which the jury could have found that 'ass' meant a stupid fellow, for possibly the only judicial knowledge of an ass is that it is *equus asinus*. If it is felt that a jury ought to have the power of awarding damages, then there is much to be said for taking first a verdict simply for plaintiff or defendant, with no amount stated. This would be followed by a further hearing on the amount of the damages. A good deal of time might also be saved by such a change in procedure, since a verdict for the plaintiff would end the matter, and there would be no need for evidence and argument relating solely to damages.

Questions of money can only be settled by talking about figures. To send a jury away with the idea that if they find for the plaintiff they are to give 'substantial' damages means very little. Some jurymen feel that £100 is substantial, whilst others plunge for £25,000. The wealthier jurymen naturally think in larger amounts. In personal injury cases special juries are apt to give bigger amounts. In pre-War days the London General Omnibus Company and the Railway Companies ceased applying for special juries and asked for common juries because on the average they awarded lower

damages.³⁸ The most elementary precaution in any other kind of business would be to ask the plaintiff how much he wants, and how he has arrived at that figure.³⁹ Imagine negotiating a business deal under conditions where neither party could put any concrete proposal. A sensible discussion of damages cannot at present take place, because any such discussion before the question of liability is settled would lead the jury to suppose that the defendant really admitted liability and merely disputed the amount. This suggested procedure would not be suitable for all cases, but it should be apparent from the pleadings whether such a course would be advantageous in any particular case.

Juries in criminal cases have attracted less adverse criticism than juries in civil cases. This is partly due to the fair trial of criminal cases depending largely on those characteristics with which a jury is often adequately endowed. It is true that juries vary in quality, but so do judges and chairmen of quarter sessions. A point that is perhaps of some importance is that the Court of Criminal Appeal has far less powers over the verdicts of juries than the Court of Appeal; juries in criminal cases are allowed to do their job, so that the counterpart of *Tolley v. Fry*⁴⁰ can hardly arise.

Quite possibly the points I have been making are of far less importance than the subsidiary question of the convenience of the legal profession. When proposals were being discussed for extension of the hours of opening of a great library, the chief librarian opposed extended facilities, saying that 'Readers interfere so much with the work of the library'. A similar attitude is not unknown among judges and the professions. Sir Fitzjames Stephen⁴¹ came to the conclusion that a judge and special jury was an excellent tribunal, but that a judge alone was better than a common jury. But he considered that the arguments in favour of jury trial were collateral advantages, the most important of all being that the jury saves the judge from sole responsibility. Since so few criminal trials are now on indictment, it is only King's Bench Division judges and Recorders who must have a jury if they are to escape an 'intolerable responsibility', for with justices of the peace the sense of responsibility is diffused. Stipendiaries sitting alone must take

³⁸ Committee on Juries, Minutes of Evidence, Cd. 1913/6818, Questions 2407 *et seq.*

³⁹ A careful reading of *Mechanical, etc. Co. & Lehwess v. Austin* [1935] A. C. 346, suggests that the jury gave the plaintiffs far more damages for the wrongful use of the invention than they had been prepared to accept for an out-and-out sale of the patents.

⁴⁰ [1930] 1 K. B. 467; [1931] A. C. 333.

⁴¹ History of the Criminal Law, i, 566 *et seq.*

the responsibility, remembering that it is as great a responsibility to send a first offender to prison as it is to send an old offender to penal servitude. Increase or decrease of jury trial may be largely influenced by whether the Courts are abreast of their work or have arrears. If non-jury cases can be heard sooner, then litigants, officials and judges will favour the restriction of jury trial.

All I ask is that in any change that is made we try to give the right reasons, and that jury trial shall not be discredited because we work it badly or because we wish to avoid adequate judicial strength.

SOCIETAS AS CONSENSUAL CONTRACT.

DAVID DAUBE.

EVERYBODY knows how Rabelais dumbfounded, ere they had yet found time to speak out, those unruly spirits who would not trust his account of the miraculous nativity of the horrific Gargantua. *Pourquoy ne le croiriez vous?* he exclaimed. *Pour ce, dictes vous, qu'il n'y a nulle apparence. Je vous dicz que pour ceste seule cause vous le devez croire en foy parfaite. Car les Sorbonistes disent que foy est argument des choses de nulle apparence.* Fortunately enough, modern interpolationists have not yet made use of this argument. And it is still possible, therefore, to put in a word for some good classical texts and concepts which we are asked to regard as the miraculous offspring of the horrific Tribonian.

The recently discovered fragments of Gaius, PSI 1182, have proved a most valuable accession to what we possess of Latin juristic literature. Not only do they confirm, on the whole, the authenticity of the Veronese text.¹ What is, perhaps, as noteworthy is the fact² that the entirely new passage on *societas* which neither is preserved in the Veronese palimpsest nor could be supplied from Justinian's Institutes reveals the venerable age of two important notions hitherto widely believed to be of post-classical make. The statement in D. 17. 2. 63. *pr.* (Ulpianus XXXI ad edictum) that *societas ius quodammodo fraternitatis in se habeat* can no longer be dismissed as Byzantine poetry since we know from Gaius that the parties, in an early type of partnership, did become *fratres* in a way: it is Ulpian indeed who wrote that phrase, possibly quoting from Sabinus. Similarly D. 17. 2. 1. 1 (Paulus XXXII ad edictum), 17. 2. 2 (Gaius X ad edictum provinciale) and 17. 2. 3. *pr.* (Paulus XXXII ad edictum) must all be suspected now of being genuine. According to these texts a contract of *societas omnium bonorum* has the exceptional effect that all *res corporales* of the members (but not their *iura in personam*) vest, by mere agreement, in

¹ As Professor De Zulueta puts it, in Supplements to the Institutes of Gaius, 1935, p. 3, 'the OF variants from V are required for critical work, but their chief significance is precisely their insignificance'.

² See E. Levy, Neue Bruchstücke aus den Institutionen des Gaius, Zeitschrift der Savigny-Stiftung, 1934, pp. 291 *et seq.*

the firm as a whole. It is highly probable on PSI 1182 that this rule is a remnant of the older *consortium* which was created by means of a *legis actio*. However, whilst most writers admit that criticism has gone too far in these particular cases, some extreme opinions are still held as to the character of *societas* in general: and strange as it may seem, it is precisely the fresh evidence of the fragments which has of late been used to support them. It is impossible in the available space to give even an approximate account of the problems involved. Three points only will be considered here. I. Is it true that *societas* was not a contract in the strictest sense till Justinian's time? Our answer will be that the reasons advanced in favour of this theory are not convincing. II. Is it true that the *leges* D. 17. 2. 32-34, two of which distinguish between *societas* and *communiter gestum*, come from a post-classical paraphrase of Ulpian; that this paraphrase was composed in Greek; and that the compilers retranslated them into Latin and inserted them in the Digest without consulting the original Ulpian himself? Our answer will be that there is no justification whatever for this assumption. III. Is it true that the word *consensus*, as used in the classification of contracts, has different meanings for the classics and for the Byzantines: that whilst in classical law it signifies 'the informal but "objective" declarations of the contracting parties', post-classical theorists give it the sense of 'concurrence of "subjective" wills' and alter the texts accordingly? Our answer will be that the changes in this direction, if there are any, can hardly be considered as of much importance.

I.

It was generally supposed, long before the discovery, that the classical types of *societas* (and especially *societas omnium bonorum*) must be descended from the ancient *consortium* of *sui heredes*. This view is shown to have been correct. The new Gaius tells us that *olim*, which means in pre-classical time, there existed a kind of *societas* whose members, though not necessarily of the same family, had the rights and duties of natural *consortes*. That it was but a step from this arrangement to *societas omnium bonorum* no one can reasonably doubt.³ It is also clear that some features of the latter (as *e.g.* the above-mentioned *transitus legalis*) are best explained as having been adopted, but not completely adapted, from the former. Yet we

³ On the other hand, however, it may well be that *societas unius negotiationis* and the like came to be recognized simultaneously with *societas omnium bonorum*. See below, n. 29.

have to take care not to make classical *societas* into an archaic institution. The mere fact that its scope may vary from *omnium bonorum*, partnership in all property and undertakings, to *unius rei*, partnership in a single transaction, makes evident how thoroughly the idea of a fellowship of *sui heredes* has been superseded by purely commercial considerations. Dr. F. Wieacker, in an interesting treatise,⁴ has just made an attempt to demonstrate that up to Justinian's legislation *societas* was no contract proper but, strictly speaking, belonged to the law of persons or *status*.⁵ This thesis, however, does not seem to be plausible. He says that in Sabinus' Civil Law the relationship between coheirs who do not enter into a *consortium*, *consortium heredum*, *communio incidens*, and *consortium* made by *legis actio* formed one chapter—the chapter on *societas*⁶: consensual *societas*, he holds,⁷ being a branch of *ius gentium*, was either not mentioned at all or at any rate dealt with very summarily. According to him it was Gaius who first placed *societas* on a level with sale, hire and mandate,⁸ thus giving the impression as if it were nothing but a peregrine consensual contract. But Gaius' account, he claims, was deliberately simplified for didactic purposes. As a matter of fact, he says, throughout the classical period an *actio pro socio* lay in all cases where the parties had joined in order to cooperate with one another, be it in a *consortium heredum*, a *consortium* made by *legis actio*, or a consensual *societas*.⁹ And, he goes on to say,¹⁰ though consensual *societas* was no doubt the most advanced of these forms of community, it always retained the essential characteristics of the law of family: this, again, in spite of Gaius who in his primitive manual set up too sharp a contrast between old and new.¹¹ He observes that the expression *contrahere societatem* never quite ousts the earlier and more appropriate *coire societatem*. But another point, he thinks, is far more significant. As is well known, the classics laid down that a

⁴ Societas: Hausgemeinschaft und Erwerbsgesellschaft, 1936. The book, written under the guidance of F. Pringsheim, will be followed by a second volume (see p. 23 of the first volume) in which the author will discuss not the history, but the classical system of *societas* as such.

⁵ *Op. cit.* p. 12.

⁶ Pp. 25, 51 *et seq.*

⁷ Pp. 24, 41, 71, 106 *et seq.*, 176. Some vague modification on p. 175.

⁸ Pp. 8 *et seq.*, 24, 78 *et seq.* On p. 74, however, Dr. Wieacker remarks that *societas* was first classed as consensual contract 'in the late classical system of Institutes', and on p. 75 that the innovation is 'in no case prior to that work on which Gaius based himself'.

⁹ Pp. 63, 79 *et seq.*, 175 *et seq.*

¹⁰ Pp. 9, 12 *et seq.*, 52. He proposes to elaborate this point in the second volume of his work.

¹¹ Pp. 176, 274.

societas ends when the *actio pro socio* is brought. Hence he infers that this action did not aim at contribution: for supposing, he argues, contribution had been its object, it could not possibly have dissolved *societas*, destroying thereby the very rights which it was to enforce. The result, in his opinion, is that even consensual *societas* under the classical regime produced no obligations of contribution to the common fund nor, for that matter, any obligations of *dare* or *facere* whatever the performance of which would bring about *olutio*. In other words, even consensual *societas* was primarily, not a contract, but a personal alliance like family and *consortium*. The *actio pro socio*, he says, was a penal action against a partner who had behaved disloyally and, for this reason, had to lead to a general liquidation. It was Justinian, he concludes,¹² who did away with the non-consensual types of *societas*; it was he who conceived *societas* as a relationship between parties with opposed interests, each being entitled to claim from the other contribution, whether by render or service, to the capital of the firm; it was he who in D. 17. 2. 65. 15 admitted the *actio pro socio* as a friendly suit *manente societate* and, by doing so, made of *societas* a contract in the full sense.

Now the whole chain of these arguments is rather fragile. It is by no means certain, *e.g.*, that Sabinus discussed under one head voluntary as well as involuntary unions. Lenel leaves the question open¹³; Frezza, it is true, asserts that Sabinus cannot have separated *De communione* from *De societate*.¹⁴ But Frezza's observation, quoted by Dr. Wieacker, that the term *societas* in that age was still used indiscriminately for all kinds of joint interests is far from being conclusive: the author of the *Libri tres iuris civilis* surely was as competent as Gaius to introduce a new arrangement whereby *societas* proper stood visibly out from all the other so-called *societates*. Even if we grant, however, that he had one chapter only on the subject, it would be premature to infer that he made no material distinction, within this chapter, between various groups. Is it not possible that, though following his precursor Q. M. Scaevola in the general disposition of topics, he was alive nevertheless to the

¹² Pp. 9, 12, 53, 176, 273, 343.

¹³ Dr. Wieacker, p. 41, says that Lenel in his Sabinussystem definitely assumes two separate chapters in the *Ius Civile*, one *De societate* and another *De communione*. I find no statement to this effect in Lenel. In fact he speaks of one rubric only, entitled *De societate et de communione*. On the other hand, however, he very reasonably does not jump to the conclusion that Sabinus saw no substantial difference between *societas* and *communio*.

¹⁴ Wieacker, *loc. cit.* pp. 41 *et seq.* Frezza, however, rightly admits that consensual *societas* was fully recognized and worked out already by Sabinus.

progress law had made in the last hundred years? Be this as it may, Dr. Wieacker goes definitely astray when he holds that Sabinus can have been concerned solely with the different *consortia*, but not (at least not *ex professo*) with consensual *societas*. True, Sabinus' object was to outline *ius civile*, and consensual *societas*, according to the testimony of G. 3. 154, is *ius gentium*. But it must be remembered that *ius gentium* in Gaius' language is not opposed to *ius civile* as Sabinus understands it. The two conceptions overlap. What Gaius means by assigning consensual *societas* to *ius gentium* is that this institution, being in perfect harmony with natural reason, may be found in foreign systems too¹⁵: he possibly also wishes to remind his pupils that in contradistinction to *consortium* it is available both to citizens and to peregrines. But he certainly does not imply that there is no action at civil law, and it is such a statement alone which would entitle us to conclude that the matter was not dealt with in Sabinus' *Ius Civile*. The contract of sale belongs to *ius gentium* in the Gaian sense no less than consensual *societas*: analogous transactions are recognized by all nations, and an *emptio venditio* is valid under Roman law whether concluded between citizens, a citizen and a peregrine, or even peregrines only. Yet it is an established truth that the civil *actiones empti et venditi* existed long before Sabinus, and that he commented on them. Why, then, should he not also

¹⁵ Dr. Wieacker, p. 175, claims that *ius gentium* in G. 3. 154 has nothing to do with *ius naturale*, in other words, that Gaius does not represent consensual *societas* as *ius naturalis*. He holds that it actually is *consortium heredum* and *consortium* made by *legis actio* which Gaius refers to *ius naturale*, by speaking of a *societas legitima simul et naturalis*: and consequently, he argues, the jurist cannot also think of *ius naturale* in discussing consensual *societas*. It is difficult to follow this reasoning. As a matter of fact there can be no doubt that consensual *societas*, for Gaius, does fall under *ius naturale*. We have to consider not only that he generally associates *ius gentium* and *ius naturale* (cp. the definition at the very beginning of his Institutes) but, above all, the explicit statement in 3. 154 that consensual *societas*, as a branch of *ius gentium*, *inter omnes homines naturali ratione consistit*. What about the *legitima simul et naturalis societas*? These words have regard only to the *consortium* of *sui heredes* (*olim enim*, reads Gaius, *mortuo patre familias inter suos heredes quaedam erat legitima simul et naturalis societas*). They clearly do not refer to the artificial *consortium*—which is very understandable: this type of partnership is created by a peculiarly Roman ceremony. The result, then, is that the ancient *consortium* of *sui heredes* and consensual *societas* are at once contrasted and paralleled with each other by Gaius: see F. De Zulueta, The New Fragments of Gaius, Part 2, Journal of Roman Studies, 1935, p. 20. The former is 'legitimate' (because a resultant of the Roman system of succession and mentioned in the XII Tables) whilst the latter is not. But both of them are 'natural': the settling down of brothers to a lasting union is consonant with an innate impulse of man just as much as consensual *societas*, and in neither of the two cases are special formalities required. We may add that the classification as 'natural' both of *societas fratrum* and consensual *societas* is one more proof that Gaius does not intend to exclude the latter from *ius civile* in the Sabinian sense. Dr. Wieacker himself admits that *consortium fratrum* was civil enough even for Sabinus.

have commented on the civil branch of consensual *societas*? In fact it is highly probable that he had a good deal more to say about consensual *societas* than about *consortium* created by *legis actio*. We may safely suppose (seeing *legis actio* was swept away by two statutes dating from Augustus) that the latter type was already obsolescent, if not obsolete, in his time.¹⁶ Quite apart from all this, the objection raised above against Dr. Wieacker's method may here be repeated: even if Sabinus did make *consortium* his main subject (treading, perhaps, in Scaevola's footsteps), it does not follow in the least that consensual *societas* was not a very different proposition. But let us turn to the principal question: Is Dr. Wieacker right in saying that the compilers have profoundly altered the law of the second century? In considering this point he starts from the assumption that even in the commentaries on the edict the artificial *consortium* still played a great part. He claims that Gaius put it in the background, and depicted *societas* as a mere peregrine contract, only because he was writing for students and not for scholars. It was really, he says, not till Justinian that the

¹⁶ Its decay must have set in at a much earlier date. According to Dr. Wieacker a remark in Pro Quinctio 24 (76) suggests that for Cicero the *consortium* made by *legis actio* may still have been a common form of partnership: *cum eo tu voluntariam societatem coibas qui te in hereditaria societate fraudabat*? Dr. Wieacker believes (pp. 111, 176) that the *hereditaria societas* of which Cicero is here speaking consists in an involuntary community of *sui heredes*. With this old civil community, he says, a *voluntaria societas* is paired off. Hence he infers that the *voluntaria societas* also is in all probability an institution of the old civil law: it is, in other words, the artificial *consortium*. This deduction, however, is not sound in itself. If I mention two men of whom one is old, it does not follow that the other must be old as well. But apart from this, the whole argument rests on a complete misinterpretation of the passage under notice. There appear no coheirs, let alone *sui heredes*, anywhere in the Quinctian case: in fact, not even a *societas omnium bonorum* is to be found. What Cicero means by *hereditaria societas* is, above all, this. Gaius Quinctius, the brother of his client Publius, had been *socius (uniui negotiationis)*, joint exploitation of a farm) to a man called Naevius. Gaius died and Publius succeeded him by will. The actual full *societas* is now dissolved, but Publius *qua* heir must finish jobs only half done by Gaius and *qua* heir may sue, or be sued by, Naevius for unpaid debts dating from the *societas*. The actual *societas*, that is, has become *hereditaria* (the audience can have had no difficulty in understanding Cicero: *actio hereditaria*, e.g., is a similar expression frequently denoting that action which may be brought by, or against, the heir as such). Possibly the advocate, in using this phrase, has yet another object in view. He gives it to be understood that Naevius, by tacit consent, agreed to renew the dissolved partnership (dissolved on Gaius' death) with Publius, Gaius' heir, and continued in this fresh '*hereditaria societas*' for several years though he now pretends to have been robbed by Publius from the very first. Be this as it may, since Cicero's *hereditaria societas* does not refer to a community of *sui*, there is not the slightest basis for Dr. Wieacker's conclusion (premature in any case) that the *voluntaria societas* must be a *consortium* made by *legis actio*. The conclusion actually is directly incompatible with the text. A glance at the speech will show that *voluntaria societas* signifies anything but a fellowship solemnly constituted before the praetor. If Cicero is accurate, Naevius gave out that Publius was his partner in the purchase of a particular estate (*socium tibi in iis bonis edidisti Quinctium*). Does this mean a complete community of goods and interests? Is there any hint here of a *legis actio*?

ancient civil forms of partnership were radically abolished. The texts do not bear out this theory. It is difficult to believe, without the slightest support from the sources and, indeed, disregarding the plain evidence of G. 3. 154, that Gaius, Paul and Ulpian took more than an antiquarian interest in *consortium* made by *legis actio*. On the other hand, we have already mentioned that consensual *societas* in G. 3. 154 falls under *ius gentium*, not as exclusively peregrine, but as a contract which, like sale, hire and mandate, is dictated by simple common sense and open to peregrines as well as to citizens. Like sale, hire and mandate it does give rise, under the usual conditions, to a civil action. Actually it is, as Gaius unmistakably tells us, the one classical *societas*.¹⁷ Dr. Wieacker points out¹⁸ that the classics allowed an *actio pro socio* where coheirs, instead of dividing their inheritance, went on enjoying it in common. But this does not testify to the existence of non-consensual partnership. It is an error to treat the classical union of coheirs as if it were the same more or less as the old *consortium fratrum*. On the contrary, the change from the pre-classical to the classical conception of partnership comes out nowhere more clearly. It has been agreed for a long time, and the new Gaius only confirms it, that the archaic elements peculiar to *consortium fratrum* (such as the right of any individual member to dispose of common property in its entirety) disappeared already under the Republic. The classical union of coheirs, though the traditional name of *consortium* is still applied to it here and there, is nothing in fact but a consensual *societas omnium bonorum*.¹⁹ There is no sign, it may be noted, that the compilers in the case of this *consortium* did not give an *actio pro socio*: they obviously had no reason to refuse it. We should be inclined, therefore, to take a more moderate view of the matter than Dr. Wieacker. The fact that Tribonian says nothing of those communities which must have existed in Rome at the period of the XII Tables does not argue him to have been a violent reformer: it simply shows that he did not find them in the classical books before him.²⁰

¹⁷ A careful interpretation of the Digest leads to the same result. In D. 17. 2. 19 Ulpian (XXX ad Sabinum) lays down that a *socius* cannot, by taking a partner, add him to the firm: *cum enim societas consensu contrahatur, socius mihi esse non potest quem ego socium esse nolui*. But Dr. Wieacker, p. 53, disposes of this and similar passages by saying that either the compilers are responsible or, if it is the classics, they only 'occasionally' make *pro socio* dependent on consensual *societas*.

¹⁸ P. 108

¹⁹ In this sense W. Kunkel, *Römisches Privatrecht* (P. Jörs), 2nd ed. 1935, p. 241, n. 3.

²⁰ He did find them, of course, where a writer remarked on bygone custom, as is the case e.g. in G. 3. 154. It is true that this passage is wanting in I. 3. 25.

Societas had become a branch of commercial law, probably before Sabinus, undoubtedly by the time when Gaius published his *Institutes*.

This being so, it only remains to examine whether the Digest presents a distorted account of consensual partnership itself. According to Dr. Wieacker it does: even consensual *societas*, he maintains, was no contract in the full sense under the classical system. He says, in the first place, that *coire societatem* is an older phrase than *contrahere societatem* and never completely discarded. But this argument is not very strong. *Contrahere societatem* occurs in Republican authors.²¹ That *coire* remains in use side by side with it is of no great consequence. Language is conservative: it often reflects the conditions of an earlier age. In the second place he holds that *societas*, in classical law, creates no obligations of contribution. He states, in support of this view, that the technical terms *in medium ferre, conferre, communicare* refer, not to the actual union of funds, but to those items which must be taken into account in an *actio pro socio*: in other words, the jurists speak of the *in medium ferre* of certain things, not during the *societas*, but in the condemnation.²² There are, however, some important texts where these expressions do denote contributions made while a *societas* exists or even while it is in the stage of being created.²³ And even if we ignore these passages, the very fact that the terms in question are employed with reference to condemnation is evidence against rather than in favour of Dr. Wieacker's thesis. It is well known that classical lawyers are inclined to discuss the substantive rights arising under a contract from the point of view of their adjective remedies, of procedure. They do not deny thereby that the rights exist also when no action is brought: indeed there hardly is a better proof of their existence than the possibility of enforcing them. Thus, when Paul says, *e.g.*,²⁴ that a partner will be compelled, in the *iudicium*, to transfer his acquisitions to the firm, we may fairly conclude that he is obliged to transfer them before it comes to liquidation. It may be observed that as soon as we turn to non-juristic literature, we

But the omission does not involve, as Dr. Wieacker on p. 53 contends, a material alteration of the law. Gaius himself states explicitly that the ancient *consortia* he mentions are out of date: they existed, he says, *olim* (see W. Kunkel, *op. cit.* p. 242, n. 7). It is easily intelligible, therefore, why the compilers set them aside. After all they had to write a code, not a history.

²¹ Cp. the above-mentioned passage Pro Quinctio 24 (76)—*coire*—with 11 (38) of the same speech—*contrahere*.

²² P. 15.

²³ See G. 3. 149 and D. 17. 2. 29. 1 cited below in this article, n. 28.

²⁴ D. 17. 2. 74 (LXII ad edictum). *Si quis societatem contraxerit, quod emit, ipsius fit, non commune: sed societatis iudicio cogitur rem communicare.*

find the above-quoted terms freely used as signifying the actual contributions of the parties to an existing *societas*.²⁵ The other fact which Dr. Wieacker thinks is incompatible with *societas* as producing obligations of contribution is the termination by *actio*: he says that if obligations of contribution existed, an *actio* could not end the partnership, destroying in this way exactly those claims on which it is based. But does not *litis contestatio* always novate, if not the whole underlying debt, at least the points brought into issue?²⁶ Are we to assume that a vendor is not bound to deliver the goods nor a buyer to pay the price because an *actio empti* or *venditi* may extinguish these duties by novating them? Dr. Wieacker may be justified in accepting the current view that D. 17. 2. 65. 15 (Paulus XXXII ad edictum) comes from the hand of Justinian. But the fact that Justinian, in *societas vectigalis*, i.e. in a *societas* altogether different from ordinary *societates* (it possibly could even have a corporate personality), and even here in exceptional cases only, allowed the *actio* to be brought *manente societate*, is not sufficient to show that it was he who first introduced into partnership obligations of contribution. The only inference we can draw from this interpolation (if it is one) is that the State took an increased interest in the efficient working of firms of tax-farmers.²⁷ Actually, it is quite clear from the sources that classical *societas* does create obligations of contribution—contribution in the widest sense: of funds, skill, labour or (in the majority of cases) a combination. In classical law the shares of A and B may be equal even if A provides the whole capital; the reason offered by the jurists is that B's co-operation may well be worth A's money: why do they give this reason if not to explain that valuable work is contribution just as much as capital?²⁸ But Dr. Wieacker goes yet a step further: he

²⁵ According to Gellius, Noctes Atticae 1. 9. 12, the *consortium* called *ercto non cito* was created in the following way: *quod quisque . . . habebat in medium dabat et coiatur societas inseparabilis*. De Officiis 1. 7 (22) is also interesting. Cicero says that as members of the *humana societas* we should *communes utilitates in medium afferre*.

²⁶ Certainly in *pro socio* a *praescriptio pro actore* is not available: *litis contestatio* inevitably dissolves the entire contract. Partners are expected to help, not to attack, each other, and going to law therefore is interpreted as renunciation (D. 17. 2. 65. *pr.*; Paulus XXXII ad edictum, referring to Proculus). But it is difficult to see why obligations of contribution should be less possible than where an action, restricted by a *praescriptio*, only destroys the individual claim raised. See also below, n. 30.

²⁷ In the case of D. 39. 4. 9. 4 (Paulus V sententiarum) it might easily come to litigation. Surely there is much to be said against automatic dissolution, because of one *socius minus idoneus*, of a big concern of tax-farmers.

²⁸ G. 3. 149: *nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia valet*. Cp. D. 17. 2. 29. 1 (Ulpianus XXX ad Sabinum):

claims that not only are there no obligations of contribution in the classical period, but no obligations at all so that performance would mean *solutio*. There is no textual authority for this assumption. Certainly a *socius argentarius* is not released, for instance, by furnishing the agreed capital. This does not imply, however, that there exists no definite obligation of furnishing it: he is not released merely because he is bound, under his contract, to do other things besides. Dr. Wieacker, under the influence of the historical remarks to be found in the new fragments, takes notice chiefly of *societas omnium bonorum*. But we have no reason to suppose that *unius negotiationis* and *unius rei* are later kinds of partnership; still less that they were not eminently practical in the Principate.²⁹ Now let us consider a case of *societas unius rei*. Some men jointly buy a slave who shows considerable talent for acting; they give him a good training and sell him with profit; each pays his share of the expenses and the price received is duly divided: does this not constitute discharge?³⁰

Of course one cannot dispute those numerous distinctive features of *societas* and *pro socio* some of which may be explained

plerumque enim tanta est industria socii, ut plus societati conferat quam pecunia. No doubt the interpretation of *opera* and *industria* as *pecunia* may go back to a time when *consortium* of *sui heredes* was still the model on which other types of partnership were formed (see Wieacker, p. 18). In that *consortium* all members naturally were of equal property. When, in new types of partnership, real equality was no longer required, the jurists assumed an artificial equality by saying that a *socius* can make up with his brains for what he lacks in capital. But whatever the historical background, the fact remains that the classical lawyers, who are no longer concerned with the ancient *consortium*, construe as contributions both capital and work of a partner in consensual *societas*.

²⁹ See W. Kunkel, *op. cit.* p. 241, n. 6. The view, advocated by Dr. Wieacker, that the earliest type of consensual *societas* was *omnium bonorum*, that *omnium quae ex quaestu veniunt* came next, then *unius negotiationis*, and *unius rei* last, rests on the postulate that law and all other systems governing social life develop in a beautifully logical manner. Unfortunately history, in reality, goes its own way. Why should not two friends, as soon as consensual *societas* was at all possible, have combined for a single transaction? Maybe the desirability of partnerships less radical than *consortium* was itself one of the causes that led to the recognition of consensual forms. *Societas omnium bonorum*, one might perhaps object, shows archaic features such as do not occur in *unius rei*. But it is only natural that the rules applying in *consortium* had a greater influence on the formation of *omnium bonorum* than on any of the other *societates*. Moreover, where people become partners in all property and undertakings, some special provisions are simply necessary. In any case, as we have seen above, n. 16, *societas unius negotiationis*, e.g., was quite common in Cicero's time.

³⁰ Justinian's innovation in D. 17. 2. 65. 15 appears far less revolutionary if only we bear in mind that *pro socio*, in practice, had regard to *societas unius rei* as frequently as to *omnium bonorum*. The process, in *unius rei*, concerns a particular affair only. What Justinian did was to admit a similar process in *societas vectigalis*, though the contract itself is here for a longer series of transactions. It even looks as if tendencies towards a reform of this kind existed rather early. In D. 17. 2. 65. *pr.* (Paul, with reference to Proculus) emphasis is laid on the fact that *pro socio* dissolves partnership *sive totorum bonorum sive unius rei societas coita sit*. The jurist seems to protest against the view that in *societates* other than *unius rei* an action does not affect the relationship as a whole.

as resulting from the nature of the case itself, some, indeed, as traces of the ancient *consortium* (a good deal of *ius fraternitatis* belongs to both these categories). But it is one thing to say that partnership shows some special characteristics and another that the classics, who are no Byzantine doctrinaires, still oppose it to contract proper. *Socii* no doubt are not merely 'hostile' parties like buyer and vendor, each being bent on getting the utmost out of the other: they are also 'friends', as against third persons. It should be noted, however, that the parties have common interests also in a contract of mandate and even, though in a less degree, in several forms of *locatio conductio*. Moreover, the evidence that Tribonian tried to suppress this 'friendly' aspect of partnership has yet to be found. At all events, the *actio pro socio*, in the edict, is separated from *familiae erciscundae* and *communi dividundo*, and placed among the *bonae fidei iudicia*, between the contract of mandate and the contract of sale.³¹ Gaius, as we have seen, classes *societas* as a consensual contract, together with sale, hire and mandate. The upshot of all this seems to be that it was not the compilers who were the great jurists (this is actually what we must assume if we accepted the views set forth by the 'advanced' school of interpolationists), but that the startling change from impracticable archaic custom to the modern law of civilized Rome, in *societas* as in other fields, is due to the lawyers of the last two centuries of the Republic and the first two of the Empire.

II.

Some texts say that *societas*, in contradistinction to mere *communio* (arising, e.g., in the case of joint legacy or inheritance) and particularly to *communiter gestum* (e.g. a casual joint purchase by two men who do not consider themselves bound in

³¹ This point is not so negligible as Dr. Wieacker, p. 74, maintains. It should be observed, first of all, that the formulas both of *familiae erciscundae* and *communi dividundo* included an *intentio* and a *condemnatio*, in order that inequality in division might be adjusted by payments. Whether or not there were the words *ex fide bona* we do not know. We do know, however, that the classics practically dealt with the matter in much the same way as with *bonae fidei iudicia* (Lenel, *Edictum Perpetuum*, 3rd ed. 1927, pp. 208 *et seq.*, 211, n. 9). It follows that had *societas* been chiefly a relationship concerning *status* and belonging to the law of persons even in classical time, Julian would better have spared himself the trouble of shifting it to the general section on *bonae fidei iudicia*, and simply left it in one chapter with the old divisory actions. Secondly, Julian no doubt had some reason for putting *pro socio* precisely after *mandati* and before *empti venditi*. The reason is obvious. *Societas*, for the classics, was similar to mandate on the one hand, because of a fiduciary nature and making the partners managers for each other's affairs; to sale on the other, since the partners 'buy' each other's contributions. But even if one does not agree with this explanation, the fact in any case remains that Julian placed *societas* between two contracts.

partnership), involves *affectio societatis* and must therefore be based on *tractatus*, on a definite agreement of the parties to become *socii*. The rule does not seem unreasonable, and should be welcomed, one might expect, by those who regard *societas* not as a contract but as an intimate personal relationship. However, 'subjective' notions like *animus*, *affectus*, *affectio* are so vehemently attacked nowadays that it would be hopeless to defend them.³² D. 17. 2. 31-33³³ will, in consequence, be treated in the following pages as being corrupt. According to Dr. Wieacker³⁴ these *leges*, and 17. 2. 34 as well,³⁵ are suspect also on other grounds. It is widely held that, as a rule, those fragments in the Digest which are rather brief were not found by the compilers in the course of their systematic perusal of the *prudentes*: they are quotations, it is said, partly from university lectures, partly from post-classical paraphrases of classical writings; and, needless to mention, they were introduced in the code so as to bring out very clearly the new Byzantine conceptions and doctrines. Dr. Wieacker claims that D. 17. 2. 31-34 forms a series of fragments of this sort: and though 34 has $7\frac{2}{3}$ lines in my copy (*editio minor* by Mommsen and Krueger) and 31 even $9\frac{1}{4}$, it is impossible to prove the contrary. But he proceeds to put forward a yet more radical view. He says that the compilers took the *leges* 32-34 from a Greek paraphrase of Ulpian, retranslated them into Latin, and gave them their present position, without even so much as opening the original Ulpian. This theory, however, can indeed be shown to be baseless. His argument runs as follows. D. 17. 2. 32 reads: *Ulpianus libro II ad edictum: Nam cum tractatu habito societas coita est, pro socio actio est, cum sine tractatu in re ipsa et negotio, communiter gestum videtur*. The inscription of this fragment, says Dr. Wieacker, is wrong. He thinks that the post-classical doctrine of *animus societatis contrahendae*, *affectio* and *tractatus* cannot have made its way into Ulpian II ad edictum, the chapter speaking *de vadimonio Romam faciendo*. In actual fact, he asserts, the fragment comes, not from book II, but from book XXXII

³² We dare not even mention that Cicero unfeelingly speaks of *animus societatis* and similar delicate things. Dr. Wieacker, p. 341, says that it is not permissible to refer to Cicero in this connection, because he frequently adopts metaphors from Greek philosophy.

³³ All fragments are from Ulpian: fr. 31 from XXX ad Sabinum, 32 from II ad edictum, 33 from XXXI ad edictum.

³⁴ Pp. 56 et seq.

³⁵ Gaius X ad edictum provinciale. One might be inclined, at first sight, to think that the quotation of this fragment in Dr. Wieacker's book must be due to a misprint. But this is not possible. Not only is the reference repeated six times on pp. 56 et seq., but on p. 57 Dr. Wieacker even gives full particulars: 'D. 17. 2. 34, Gaius X ad edictum, Sabinian mass'.

whose subject, he assumes, is *pro socio*. The mistake in the inscription, he goes on to say, must necessarily date from pre-Justinian time. He holds that if Tribonian had still had before him the correct reference *libro XXXII*, he would have inserted the *lex* after, not before, D. 17. 2. 33: for 17. 2. 33, he argues, is from Ulpian XXXI, and as Tribonian generally followed the order of the commentary used, an excerpt inscribed XXXII would have been placed by him after one inscribed XXXI. It follows, in his opinion, that Tribonian simply quoted the fragment, with its wrong inscription, from a post-classical paraphrase of Ulpian; he did not even look up the corresponding passage in Ulpian himself: had he done so, Dr. Wieacker contends, he would have discovered the mistake. The paraphrase, according to Dr. Wieacker, was in Greek. The wrong inscription, II instead of XXXII, can more easily be understood, he urges, if we imagine Greek figures, β'' and $\lambda\beta'$. Thus, he says, D. 17. 2. 32 is direct evidence that Tribonian unscrupulously used Greek treatises in order to insinuate his ideas into the Digest. And he concludes by suggesting that 17. 2. 33 and 34 also may be regarded as mere retranslations from Greek: these also, he states, the compilers extracted from a Byzantine paraphrase of Ulpian without consulting the original authors (33 by Ulpian, 34 by Gaius) at all.

There are several serious flaws in this intricate conjecture. First of all an inference that if D. 17. 2. 32 comes from a Byzantine source the same must be true of 33 and 34 is, from the point of view of method, quite unjustifiable. As for *fr.* 34 in particular, we may remark that considered in itself it presents none of those notions (*affectio*, *tractatus* and so on) which are declared by some to indicate interpolation. The Index Interpolationum names not a single authority which has attacked this fragment; Lenel in his *Palingenesia* says that the final clause, originally, may have contained a reference to Sabinus³⁶; Dr. Wieacker himself does not tell us why he rejects the text nevertheless: why, then, are we to reject it? Secondly, let us suppose for a moment the inscription of 17. 2. 32 were wrong (II instead of XXXII): is it correct that a pre-Justinian writer must be responsible? There are obviously two other possibilities. The mistake may be due to a member of Tribonian's committees: the culprit read the accurate reference in the classical work, but

³⁶ *Inter eos quoque, quibus hereditario iure communis res est, posse et communi dividundo agi*—Lenel: *Sabinus ait*. Dr. Wieacker, in his *ex professo* enumeration of those statements in D. 17. 2 which may go back to Sabinus (pp. 45 *et seq.*), takes no notice of Lenel's suggestion.

noted and submitted the wrong one. Or it may even be due to a post-Justinian copyist, whilst the compilers themselves gave XXXII. This, Dr. Wieacker says, is impossible: if the compilers had given XXXII, he holds, they would have inserted the fragment after 17. 2. 33 which is from XXXI. But surely there is a good reason why 32 has to precede 33 no matter what its position was in the classical commentary: 33, as it stands in the Digest, gives only some illustrations of the general principle laid down in 32. Thirdly, Dr. Wieacker claims that the inscription of *fr.* 32 is wrong. The doctrine of *animus societatis contrahendae*, he maintains, has no place in Ulpian II: the *lex* is to be assigned to XXXII, Ulpian's book (he says) on *pro socio*. Some Greek copyist, he explains, must have read β' for $\lambda\beta'$. We may, however, draw attention to the fact that Ulpian discussed *pro socio* not in $\lambda\beta'$, but in $\lambda\alpha'$. This can be seen from any copy of the Digest as well as from Lenel's *Edictum Perpetuum*.³⁷ Fourthly and finally, the inscription of D. 17. 2. 32, *Ulpianus II ad edictum*, is no doubt correct: the doctrine of the *animus societatis contrahendae*, be it classical or post-classical, did make its way into Ulpian II, *de vadimonio Romam faciendo*. This can be seen from Lenel's *Palingenesia*³⁸ as well as from his famous article *Beiträge zur Kunde des Edicts und der Edict-commentare*.³⁹ What is the explanation? A municipal magistrate, under Roman law, is not qualified to deal with actions condemnation in which involves *infamia*.⁴⁰ Any action of that kind must be submitted to the praetor in Rome. Clearly the proper place for Ulpian to discuss this point was book II of his commentary, where he treated of all other cases too that might only be dealt with by the praetor. And it is not surprising to find that he thought it requisite in this connexion to give a brief account of such *iudicia* as are, indeed, similar to one another in some respects, but different in the matter of *infamia*. Thus he remarked, in book II, upon the distinction between *commodati* and *locati* on the one hand and *fiduciae* on the other, D. 13. 6. 9 and 19. 2. 39; between *certae creditae pecuniae* and *depositi*, 12. 1. 10; between *condictiones ex famosis causis*

³⁷ 3rd ed. 1927, pp. XIX and 297.

³⁸ *Palingenesia Iuris Civilis*, vol. 2, 1889, p. 425: in footnote 8 Lenel comments on the very fragment under notice, D. 17. 2. 32, and shows why the inscription must be regarded as intact.

³⁹ *Zeitschrift der Savigny-Stiftung*, 1881, p. 37. Lenel refers to this article also in his discussion of *vadimonium Romam faciendum* in the *Edictum Perpetuum*, p. 55, n. 3.

⁴⁰ Lenel, *Beiträge zur Kunde des Edicts*, *loc. cit.* p. 37, quotes Isidorus, *Origines* 15. 2. 10: *liberales et famosissimae causae . . . ibi (i.e. in municipiis) non aguntur*.

pendentes and actions really involving *infamia*, 44. 7. 36.⁴¹ It is to this group of *leges* that D. 17. 2. 32 belongs. The fragment, of course, may have been altered by the compilers. But that Ulpian, in *de vadimonio Romam faciendo*, examined the problem when a man must be content with *actio communi dividundo* (which does not lead to *infamia*) and when he may bring an *actio pro socio* (where condemnation does make infamous) is beyond all question. The latter, according to 17. 2. 32, cannot be brought unless the case is one of partnership proper based on *tractatus*; where there is no *tractatus* as in *communiter gestum*, the remedy is *communi dividundo*. The result is obvious: the whole theory that Tribonian, contrary to his emperor's instructions, had recourse to Greek treatises, latinized them, and incorporated them with the Digest regardless of the classical works on which they were founded, in this instance at least utterly breaks down.

III.

We have already mentioned that many writers consider as spurious those texts in which emphasis is laid on elaborate 'subjective' concepts like *affectio societatis*, *animus societatis*, *etcetera*. Some even go so far as to maintain that on the whole any insistence on psychological phenomena (such as 'intention' or 'concord') is alien from the classical spirit.⁴² The champions of this cause, however, find great difficulty in explaining the rule, undoubtedly classical,⁴³ that a contract of partnership must be based on *consensus*, and, indeed, in explaining the existence of obligations that *consensu fiunt* in general: for *consensus*, to an unprejudiced reader, seems primarily to refer to a 'subjective' attitude of the party or the parties concerned. The way they try, and fail, to get round this difficulty is rather interesting. They say, following herein Perozzi,⁴⁴ that *consensus* as used by the classics does not mean *consensus*. It does not mean, in other words, the concurrence of two or more wills nor, for that matter, the internal resolution of one person to accept the proposals of another. It is only the Byzantines, thus Perozzi and his school argue, for whom the term signifies a certain state of mind: in classical time, we are told, it denotes nothing else than the informal

⁴¹ Cp. D. 50. 17. 104 and 47. 12. 1, also from Ulpian II ad edictum. On Paul's chapter *de vadimonio* see Lenel, *Palingenesia* and *Beiträge*.

⁴² A sound middle course is taken by H. F. Jolowicz, *Historical Introduction to Roman Law*, 1932, pp. 528 *et seq.*

⁴³ *E.g.* G. 3. 135 *et seq.*

⁴⁴ *Istituzioni di Diritto Romano*, 2nd ed. 1928, vol. 2, pp. 30 *et seq.*

but 'objective' declarations made by the parties in sale, hire, partnership and mandate. To say so, however, evidently is begging the question. Things being as they are, we just have to put up with the fact that *consensus* does stand for very much the same as the English 'consent'. There is simply no passage in Latin literature, legal or non-legal, where the word has a different sense.⁴⁵ And, when we come to think of it, is the result so unbearable?⁴⁶ Dr. Wieacker claims (adopting Perozzi's idea)⁴⁷ that 'the principle of agreement plays no part whatsoever in the classical conception of contract'. But is it likely that the men who created the much admired system of Roman law did not see what was known to any witch-doctor before, and to any pedant after, namely, that a contract normally involves mutual understanding between the parties—otherwise it would be meaningless? In fact it may be well expressly to state that the importance of actual 'subjective' agreement was quite clearly recognized by the classical jurists not only in the so-called consensual contracts, but in all other kinds of contract and, naturally, in mere *pacta* too; there are numbers of texts extant which, however much they may have suffered under the hands of glossators, are intact at least as regards this essential point.⁴⁸ Certainly, seeing that the only possible evidence of a man's intent is external facts,

⁴⁵ Dr. Wieacker, p. 90, asserts that *sentire* means not only 'to feel' but also 'to declare' and that *consentire*, therefore, may well mean 'to declare together'. In support of his statement concerning *sentire* he refers, n. 2, to Thesaurus Linguae Latinae s.v. *consensus*, *consentire*, without, however, specifying which of all the texts quoted in that lexicon he has in mind. In actual fact the Thesaurus says not of a single passage that *consensus* or *consentire* has there a different meaning than Cicero's 'psychologically coloured' *consensus*.

⁴⁶ I gladly acknowledge my indebtedness, in this matter, to W. W. Buckland, A Text-Book of Roman Law, 2nd ed. 1932, pp. 413 *et seq.*, and to W. Kunkel, *op. cit.* p. 83, n. 7.

⁴⁷ P. 82.

⁴⁸ On *nudus consensus* see below, n. 52. In D. 2. 14. 1. 3 (Ulpianus IV ad edictum) the passage *adeo autem—sive verbis fiat* may be too short or too long, or both, as compared with the original Ulpian. This much, however, is certain: Ulpian cited Pedius for his view that the element of agreement is common to all contracts. We cannot, of course, discuss here each single text that has been declared corrupt because it contains a hint at the agreement underlying contract or pact. One example may suffice to show how careful we have to be in assuming alteration. Dr. Wieacker, p. 274, contends (as others before him) that 2. 14. 1. 2 is interpolated. His reason is that *consensus* in this passage signifies, not so much the declarations of the parties, as their actually coming to 'subjective' agreement. As paragraph 2 is closely connected with 1, we quote both of them: *Pactum autem a pactione dicitur (inde etiam pacis nomen appellatum est); et est pactio duorum pluriumve in idem placitum (et?) consensus*. Now first of all *consensus*, as we shall see, does refer to 'subjective' agreement already in classical works. Quite apart from that, however, it should be noted that Ulpian is not giving here a legal rule but one of those general explanations with which some jurists obviously liked to open a new chapter: he is giving the etymology of the word *pactum*. Is it correct to apply to a statement of this kind the same standard as, say, to a *responsum* in which everything depends on preciseness of expression?

'subjective' agreement, if it is to become legally relevant, must be shown somehow or other. Consensual contracts and *pacta* just as much as formal transactions require something more than agreement at heart; since it is not an omniscient being but poor earthly creatures who have to decide whether or not a contract has been concluded, 'objective' indications are always necessary. Further, where the 'objective' facts are such as to justify the assumption of a contract or pact, the actual intentions of the parties are as a rule of minor interest. Administration of justice obviously would be impossible if the defendant in an *actio empti* could defeat his opponent by saying that *emere* in his personal language means *non emere*. Sometimes, therefore, the existence of a valid arrangement must be denied though there be real consent, sometimes a person will be regarded as bound even if he convincingly proves that he did not want to bind himself. But for all that we have to consider, in the first place, that the cases where 'objective' and 'subjective' facts are at variance are only exceptions. The ordinary function of any contract, whether consensual or non-consensual, is to produce exactly that 'objective' situation which is 'subjectively' desired by the parties. It is their concurrent wishes (setting aside exceptions) that form the starting-point and main element of contract, *pactum* and any similar arrangement; and, as we have remarked above, this commonplace truth was no mystery to the classics. In the second place, it is easy to exaggerate the 'subjectivism' of the Byzantines. True, the fact that legal science in the post-classical era was no longer in the hands of eminently practical public men but became more and more the exclusive affair of the universities, inevitably led to the introduction into law of purely philosophical concepts and methods. One should remember, however, that not even Byzantine jurists could do entirely without 'objective' evidence.⁴⁹ Moreover, as for the

⁴⁹ Modern authorities, whilst eliminating every 'subjective' notion from classical works, tend to interpret away every 'objective' notion from post-classical ones. Dr. Wieacker, p. 341, maintains that the Byzantine theory of *διὰθεσις* came to the Western Empire with the Turin Gloss of Justinian's Institutes. He is content with adducing, in proof of his view, the paraphrase of I. 3. 27. 3: *ii qui societatem habent consensu vel obligationibus ad invicem obligantur, ii vero qui communionem habent eventu et ignorantia sibi coniuncti sunt*. The antithesis, Dr. Wieacker argues, set up between *consensus* and *ignorantia* reflects the Byzantine doctrine as influenced by Aristotelean philosophy. He claims that the Turin Gloss no longer uses *consensus* as referring to the correspondent declarations of the parties, nor even as signifying the concurrence of their wills: the term, he holds, now denotes a 'unilateral' element of will in any one of the persons concerned, else *ignorantia* could not be opposed to it. As a matter of fact, however, the text does not contrast *consensus* and *ignorantia* as such (though even this would prove nothing): we are told that whilst *societas* is created '*consensu*

Digest and other texts originally written by classical lawyers, experience (such as the discovery of the new Gaius) up to the present has shown us that they were 'classical' enough to resist all but the most superficial alterations.

The question thus arises: if, on the one hand, *consensus* did signify 'agreement' and *consentire* 'to agree' in all periods of Latin literature, and if, on the other hand, every contract (whether *re*, *verbis*, *litteris* or *consensu*) normally presupposes *consensus* as well as some expression of it, how then did the classics, or their precursors, come to qualify a certain small group of transactions as 'consensual' proper? It is only if we can answer this question that the foregoing remarks may be considered adequately proved. The answer is not difficult to find. There is, notwithstanding the fact that objectified consent is essential in any kind of contract, an important difference between consensual contracts and all the others. Whereas in all the others the 'subjective' component, though present, is concealed, so to speak, behind a definite visible procedure, *res*, *verba*, *litterae*, nothing of the sort stands in the light of *consensus* in consensual contracts. In other words, all types of contract, save consensual ones, are characterized, and sufficiently characterized for the purpose of classification, by certain striking external features as the handing over of the subject-matter (*res*), the use of special words (*verba*), the entry made in a cash-book (*litterae*): which does not imply, however, that *consensus*, behind *res*, *verba* or *litterae*, is not of the greatest relevance. It is only consensual contracts that are not accompanied by regularly recurring, easily describable, conspicuous circumstances. The parties may settle the matter in the way they like best, personally, *per epistulam*, *per internuntium*.⁵⁰ As a result the *consensus*, the mutual understanding itself, is here the one stable factor from which any classification of the group must start. *Consensus* is here the element most easily to grasp and, therefore, taken by the lawyers as the distinctive mark of these cases: which does not imply, however, that the agreement has not in some way to be expressed. It follows that Perozzi and his supporters are right indeed when

vel obligationibus', *communio* comes to existence '*eventu et ignorantia*'. The meaning no doubt is that whereas *societas* is based on an actual voluntary arrangement between the parties, they cannot in the same way bring about joint inheritance and legacy—the most frequent cases of *communio*. They become joint heirs, that is, without having made a contract, without even having foreseen what would happen at all. Whatever school of philosophy the author of the Turin Gloss may belong to, I fail to see the fundamental difference between this and the classical conception.

⁵⁰ G. 3. 136.

they say that some contracts are called consensual because they are the least formal of all.⁵¹ But they are wrong when they draw the inference that the notion of *consensus* as such, in classical time, is 'apsychological' and, though referring to a comparatively informal mode of transaction, still solely refers to 'objective' form. On the contrary, the absence of a clearly determinable form is the reason, as we have seen, why the psychological element, equally inherent both in formal and informal arrangements, comes to the foreground in consensual contracts proper.⁵² *Consensus* is 'subjective'; it underlies every sound contract and pact; the classics knew that and yet labelled, with good reason, only a small group of contracts as created *consensu* in contradistinction to real, verbal and literal contracts.⁵³

⁵¹ Cp. G. 3. 136: *Ideo autem istis modis consensu dicimus obligationes contrahi, quod neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos, qui negotium gerunt, consensisse.*

⁵² The *nudus consensus* of G. 3. 154 should neither be declared a late gloss nor misinterpreted as external form (the latter course adopted by Dr. Wieacker, p. 101). Apart from the fact that it occurs in the new fragments (though V has *consensu contrahitur nudo*, PSI 1182 *nudo consensu contrahitur*), there is no reason to assume that the idea cannot be classical. Gaius contrasts consensual *societas*, based on 'mere' agreement, with the artificial *consortium* which obviously requires, in addition to *consensus* (*sic*; 'subjective' *consensus*), an elaborate ceremony: this scheme is not very different from that in 3. 136 where *verborum* and *scripturae proprietas* is opposed to *sufficit consentire*. Similarly, *nudus consensus* seems perfectly authentic at least in D. 46. 3. 80 (Pomponius IV ad Quintum Mucium) and 50. 17. 35 (Ulpianus XLVIII ad Sabinum).

⁵³ Once we realize that *consensus* as used in the classification of contracts does mean 'subjective' (though expressed) agreement, the strange theory worked out by Dr. Wieacker on pp. 73 *et seq.*, 101 *et seq.* proves a fallacy. As we have seen, he believes that classical law knew non-consensual as well as consensual partnership. Now he holds that to all these *societates* there was common a sort of permanent understanding between the members which, in his view, was entirely different from *consensus* as a mode of contract: it meant indeed, he says, 'subjective' harmony and is, 'subjectivism' being foreign to classical law, only to be explained as a remnant of joint-family and *consortium fratrum* where harmony was necessary for the continuance of the community. He states, pp. 73 and 80, that only Gaius 'very erroneously' took this permanent understanding to be the same with *consensus* as mode of contract. On p. 103, however, he says that it was Gaius, Pomponius and Diocletian who 'incorrectly at least' identified the two notions; and, on pp. 321 *et seq.*, that the confusion is due to post-classical jurists and Tribonian. In actual fact, seeing that *consensus* refers to 'subjective' understanding also in the division of contracts, the lawyers are perfectly right in describing as *consensus* the permanent harmony between partners. Clearly, whilst *consensus* in sale and hire is required only once, namely to constitute the contract, one may well say that in partnership (and mandate, though this case is less important) it is required at any time, renunciation always being possible. But even if one assumes that *consensus* as a mode of contract is purely 'objective', it does not follow that the sources speak of a permanent *consensus* only by mistake. Dr. Wieacker, p. 102, adduces four texts. He claims that in none of them is *consensus* contrasted with *renuntiatio*: *renuntiatio* consisting in an 'objective' declaration, and *consensus* in these passages denoting (improperly, in his opinion) permanent 'subjective' understanding. But in two texts the contrast is made. Of G. 3. 151 Dr. Wieacker cites only the clause: *manet autem societas . . . donec in eodem consensu perseverant* (incidentally, he does not notice that V has *in eodem sensu* whilst *consensu* is from I. 3. 25. 4; not that it makes any difference; Gaius, whatever he wrote, did think of something like *consensus*). He overlooks,

It may be worth while, in conclusion, to illustrate the manner in which *consensus* is used in the classification of contracts, by adducing a few other cases where a general abstract conception acquires special prominence because there are no concrete facts to outshine it. Let us consider, for instance, the term *damnum* as occurring in the *lex Aquilia*. The first chapter of this statute, which concerns the killing of a slave or an animal, does not use the phrase *damnum facere*.⁵⁴ Now it is clear that if I slay a slave, I do cause his owner a *damnum*: and it would be a rash conclusion to say that the legislator, because he does not state it, did not see it.⁵⁵ Why does he not state it?

however, the following words, *at cum aliquis renuntiaverit societati societas solvitur*, from which the antithesis *idem consensus—renuntiatio* becomes clear. Of C. 4. 37. 5 (Diocletianus et Maximianus Aurelio Theodoro) he cites only the clause: *tamdiu societas durat quamdiu consensus . . . integer perseverat*. He overlooks, however, the following words, *proinde si iam tibi pro socio nata est actio eam inferre . . . non prohiberis*, from which the antithesis *consensus integer—actio iam nata* becomes clear (*actio* in this connexion is equivalent to *renuntiatio*). Thus, in G. 3. 151 and C. 4. 37. 5 at least, permanent *consensus* (whether 'objective' or 'subjective') differs in no essential respect from *consensus* as a mode of contract: opposed to it is the withdrawal from partnership, shown somehow or other, of one of the members. This result is only confirmed by the remaining two texts, G. 3. 153 and D. 17. 2. 37 (Pomponius XIII ad Sabinum). They are intelligible enough: in the case of *capitis diminutio* or death of one or more of the *socii* the old contract, it is true, ends, but is soon replaced by a similar one if the persons concerned are agreed on this point. Where the fundamental difference lies between this *novus consensus* and *consensus* as occurring in the division of contracts, and why the *novus consensus* must be explained as a relic of pre-classical institutions, it is difficult to see (in fact, whereas Dr. Wieacker, pp. 103 and 290, asserts that *novus consensus* is 'subjective', only incorrectly called *consensus* by Gaius and Pomponius, and an anachronistic remains of ancient communities, on p. 292 he himself expressly states, contrary to this whole elaborate theory, that the same *novus consensus* in classical time had to be declared and was not made into an internal disposition of mind till the Byzantine period). Evidently the classics, far from adopting archaic ideas, are trying to modify the harsh rule, dating from *consortium*, that *capitis diminutio* and death dissolve partnership (Dr. Wieacker, p. 290, maintains that Pomponius also spoke only of *publicatio bonorum* or *capitis diminutio*, not of death as it would appear from D. 17. 2. 37 in its present form. In the case of death, he says, it is 'senseless' to make the continuance of a *societas* easier: it must be the Byzantines who introduced this idea. I cannot see, however, that it is senseless. Why should not the heir of an *argentarius socius* and the surviving partner desire that the firm be carried on without much ado? It may be noted that even Gaius, in the very passage on *novus consensus*, 3. 153, compares *capitis diminutio* with death). Gaius and Pomponius, that is, emphasize the fact that a firm dissolved through *capitis diminutio* or death can easily come to life again by an agreement to this effect. They commit no error whatever in calling this agreement *consensus*. It simply is that *consensus* on which, according to G. 3. 135 *et seq.*, *societas* is based: though of course the jurists imply that re-establishment of a dissolved firm usually requires still less formalities than the creation of an entirely new one (in the former case tacitly continued co-operation may suffice to 'express' *consensus*). We may observe that since Dr. Wieacker's assumption of a relevant difference between permanent *consensus* and *consensus* as a mode of contract does not hold good, most of his radical conclusions in the chapter on *animus societatis contrahendae* (pp. 273 *et seq.*) appear highly improbable.

⁵⁴ D. 9. 2. 2. *pr.* (Gaius VII ad edictum provinciale); G. 3. 210; I. 4. 3. *pr.*

⁵⁵ A conclusion, however, not flimsier than the one that the classical jurists did not notice the fundamental importance of *consensus* in non-consensual contracts.

Simply for this reason: in the case of killing there is one definite act leading to one definite result; it is not necessary therefore to introduce here a general, rather theoretical idea; the facts are fittingly and intelligibly described by the words *si quis servum quadrupedemve occiderit*. It is different, however, in the third chapter.⁵⁶ This part of the *lex* deals with various kinds of harms inflicted upon slaves or beasts. Moreover, the harms named (*urere, frangere, rumpere*) are very probably meant to be examples only, that is to say, the actual intention of the law-giver was that the infliction of any kind of wound should be punishable under the statute.⁵⁷ At all events, the cases referred to in chapter 3 are not of the same uniformity as those of chapter 1. A wound may be severe or slight. Accordingly the ultimate consequences may be grave or small. And above all, whereas in the case of chapter 1 there is a concrete, visible and well-definable loss, *servus occisus* or *quadrupes occisus*, the loss in chapter 3, for the average observer, is of a more abstract nature, vague and difficult briefly to describe in a telling way. What the owner of a wounded slave loses is the difference between the former and the present value, the expenses for treatment and the like—in short, the *damnum*. In the third chapter, in consequence, we find the clause *si quis alteri damnum faxit*. Obviously, we cannot infer from that that the term *damnum*, at the period of the *lex Aquilia*, exclusively means the specific and concrete disadvantages resulting from a wound.⁵⁸ The term as such is general and abstract in the *lex Aquilia* no less than anywhere else in Latin literature. It is used, in the third chapter, with special reference to the loss ensuing from a wound merely because the *damnum facere* itself is the one invariable and sufficient characteristic attaching to all cases that come under this paragraph. A similar example is to be found in the XII Tables, in the well-known provision on *iniuria*.⁵⁹ The XII Tables

⁵⁶ D. 9. 2. 27. 5 (Ulpianus XVIII ad edictum); G. 3. 217 *et seq.*; I. 4. 3. 13.

⁵⁷ In classical law the scope of the third chapter is even wider: it is regarded now as covering, not only damage to *res se moventes*, but any damage to another man's property in respects not coming under chapter 1.

⁵⁸ An inference, however, not flimsier than the one that *consensus*, for the classics, signifies only the 'objective' declarations made in consensual contracts.

⁵⁹ I am indebted to Professor Herm. Fränkel (now Stanford University) for valuable suggestions made to me some years ago on the question of this provision. The same authority, in *Die Zeitauffassung in der archaischen griechischen Literatur*, *Zeitschrift für Aesthetik*, 1931, Beilageheft, pp. 98 *et seq.*, has pointed out that *χρόνος* in early sources is used as signifying, not the time during which anything special happens (because the thing that happens stands in the foreground), but the 'empty' time between two notable events. We may perhaps add that even in present-day language the noun 'time' frequently refers to 'empty' time. The phrase 'I have much time', e.g., does not mean that I have more time in the

punished breaking a man's limb, *membrum ruptum*, a very serious offence; fracturing a man's bone, *os fractum*, not quite so serious; and smacking a man's face and similarly harmless blows, *iniuria*.⁶⁰ How is this use of *iniuria* to be explained? There can be no doubt that the term *iniuria* signifies any wrongful act or, in an even more abstract sense, the illegality of an act as such. There can be no doubt either that this signification goes back to the time of the XII Tables; it is, one may say, as old as the word itself: the formation of *in-iuria* is too clear to admit of misinterpretation. The authors of the XII Tables, then, must have seen that the breaking of a limb or the fracturing of a bone constitutes *iniuria* as well as a slap in the face. Conversely, a slap in the face is far from being the essence of *iniuria*. In other words, *iniuria* in this case is realized in some external act just as much as in *membrum ruptum* and *os fractum*: illegality that remains in the abstract clearly cannot be punished. And yet, in spite of the fact that *membrum ruptum* and *os fractum* are forms of *iniuria* no less than a blow, and that a blow is 'expressed' *iniuria* no less than the other delicts, the XII Tables called a blow *iniuria* proper as distinguished from *membrum ruptum* and *os fractum*. Why? In the case of *membrum ruptum* or *os fractum* there is no need for legislator, plaintiff or defendant, to resort to a general abstract notion. The position can only too easily be described in plain language: there is the man whose bones are broken and the man who has done it.⁶¹ But what about all the other cases where a person has indeed been assaulted but has not been damaged for the rest of his life? Here a comprehensive abstract term is obviously very convenient for the authors of a code.⁶² In the first place, whilst the provisions concerning *membrum ruptum* and *os fractum* each deal with one definite delict, the offences coming under the paragraph on *iniuria* are of a more varied kind; a box on the ears, a kick in the stomach, and so on. They cannot therefore be actually depicted; unless the lawgiver

astronomical sense than anyone else, but that my time is unoccupied. A future interpolationist will conclude (provided our age should ever come to be regarded as classical) that we had no general notion of 'time'; that, on the one hand, we did not notice at all that time flies even while something interesting is going on, and that, on the other, even in phrases like 'I have time' the term denoted not time as such but an 'objective' though comparatively leisurely action. Einstein, of course, is post-classical.

⁶⁰ 8. 2 *et seq.*

⁶¹ Similarly, non-consensual contracts are adequately described as created *re, verbis* or *litteris*.

⁶² Similarly, the general term *consensus* is used for classifying sale, hire, partnership and mandate.

resolved to draw up a long list which, however, would always remain incomplete. What is more important, perhaps, is the fact that a man who goes to law in a matter of *membrum ruptum* or *os fractum* will not say, as a rule, that his opponent has committed an act of *iniuria*. He will refer to his visible, striking infirmity and say that the accused has 'broken his limb' or 'fractured his bone'. The situation is not quite the same in a process about, say, a slap in the face. Certainly, in this case also the plaintiff will tell what has happened (there must be something to tell: if nothing has happened, there is no 'objectified', legally relevant *iniuria*). But the magistrate himself, or whoever may sit as judge, sees nothing. There is no conspicuous damage to arrest his attention. *Iniuria* as such, the idea that something unlawful has occurred in general, appears in full light, not obscured by an impressive physical result.⁶³ It is thus perfectly understandable why the XII Tables opposed to *membrum ruptum* and *os fractum*, on the one hand, unlawfulness, *iniuria*, on the other, as referring in this technical connexion to blows with no serious consequences; which does not, it may be repeated, entitle us to conclude that *iniuria* was not a general abstract conception even in that remote age.

It is difficult, in dealing with a controversial topic, to avoid stressing some points which are really of no great importance, and leaving out of account others that may well deserve our attention. *A tout sera satisfait*, as that noble priestess Bacbuc said, *si de nous estes contens*.⁶⁴

⁶³ The same is true, *a fortiori*, in a case of mere insult (falling, in classical time, under *actio iniuriarum*). An insult produces no corporal damage or pain whatever. It is called *iniuria* because the delinquent does nothing but 'wrong' his victim.

⁶⁴ I should like to express my thanks to Professor W. W. Buckland for most helpful criticism and advice.

THE BURDEN OF PROOF OF NEGLIGENCE IN RUNNING-DOWN CASES.

E. WYNDHAM WHITE.

IN what are generally known as 'running-down' cases, that is to say, actions of negligence by pedestrians against motorists who have caused them injuries, the pedestrian, like every other plaintiff, has to discharge the burden of showing that the accident was due to the negligence of the motorist. This burden is made heavier by the fact that in most cases the pedestrian will have been disabled at the time of the accident from observing accurately the exact circumstances of the case and from enlisting the support of eye-witnesses. This latter disadvantage is a very real one if one takes into consideration the extraordinary reluctance of the average citizen to come forward and testify voluntarily in legal proceedings. The appalling wastage of human life and the suffering caused by road accidents in recent years is reflected in the anxiety of legislators to devise regulations for the protection and safeguarding of all road-users, and pedestrians in particular. The time is apt, therefore, to consider once again the desirability of altering in this class of cases the common law burden of proof of negligence.

The experiment has been extensively tried in Canada, where in seven of the Provinces¹ there is legislation substantially reversing the burden of proof in motor accident cases.

The Manitoba Act, which may be taken as fairly representative, provides²:

'Where any loss, damage, or injury is caused to any person by a motor vehicle the onus of proof that such loss or injury did not arise through the negligent or improper conduct of the owner or driver of the motor vehicle and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger, or be likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the motor vehicle.'

¹ Prince Edward Island, s. 65 (1); Ontario, s. 42 (1); Quebec, s. 53 (2) (a), Motor Vehicle Act; and Alberta, s. 66; Manitoba, s. 58; Saskatchewan, s. 86, am. 1935, *infra*, p. 406; and Nova Scotia, s. 180.

² S. 62.

Of this legislation it has been well said³ that it 'betokens the recognition of the fact that cherished principles must yield to stubborn facts, and that when the common law presumption of innocence, or other evidentiary or procedural rule, operates so as to embarrass the administration of criminal or civil justice a better balance must be obtained'.

The effect of a provision such as that quoted is to create as against the owners or drivers of motor vehicles a rebuttable presumption of negligence. The onus of negating negligence remains on the defendant *throughout the proceedings*. Thus, although the defendant has adduced the evidence of credible witnesses that the accident was due to a latent defect in the mechanism of the motor vehicle and the plaintiff has adduced no evidence to the contrary, the case should not be withdrawn from the jury, but should be left to them to decide by their verdict whether the defendant has satisfied the statutory onus of proof.⁴

Mr. D. N. Pritt, K.C., arguing on behalf of the defendants in *Winnipeg Electric Co. v. Geel*,⁵ urged strenuously that if there is no evidence of negligence apart from the statutory presumption and the defendants adduce evidence that they were not negligent, then the onus is discharged and if the matter rests there the judge ought to withdraw the case from the jury. This argument did not find favour with the Judicial Committee of the Privy Council:

'Their Lordships cannot accept that view of the operation of the section.⁶ Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements; . . . as to the second the onus is removed from his shoulders.'⁷

If he proves those two elements he may close his case, and it is then for the defendant to establish that the loss or injury did not arise through the negligence of himself or his servants. The onus thus cast upon the defendant is not shifting or transitory, but rests upon him until the very end of the case. The result,

³ V. C. Macdonald, xiii Can. Bar Rev. 550.

⁴ *Winnipeg Electric Co. v. Geel* [1932] A. C. 690.

⁵ [1932] A. C. 690, 694.

⁶ S. 62 (Manitoba), Motor Vehicle Act (text *supra*).

⁷ *Per* Lord Wright [1932] A. C. 696 *et seq.*; see also *per* Turgeon J.A. in *Stanley v. National Fruit Co.* (1929) 24 Saskat. L. R. 141.

then, of this and similar provisions is to put the defendant in a position analogous to that of 'the defendant in a case to which the principle often called *res ipsa loquitur* applies'.⁸

The defendant may discharge his burden of proof, as Lord Wright pointed out, in various ways, as by negating negligence altogether, or by proof that his negligence was not the cause of the plaintiff's loss or damage, or by proof that he had no clear last chance of avoiding the accident (concurrent negligence).⁹

In the provision quoted above the onus on the defendant is of proving that the plaintiff's loss or damage did not 'arise out of' the defendant's negligence and on a strict construction of the words it is arguable that evidence of contributory negligence is irrelevant to the issue since an affirmative finding of contributory negligence does not establish that the damage does not 'arise out of' the defendant's negligence, but merely that it was not solely or entirely caused thereby. This was the view taken by the Supreme Court of Canada in *Poole & Thompson, Ltd. v. McNally*.¹⁰ From a logical standpoint it is difficult to come to any other conclusion on this point, although the Supreme Court of Nova Scotia has sustained a finding of contributory negligence in a similar case.¹¹ The consequence of the doubts raised by the earlier decision has been that Alberta,¹² Saskatchewan,¹³ and Manitoba¹⁴ have amended their sections to read 'that such loss or damage did not *solely* arise' out of the negligence or improper conduct of the driver.

Such, then, is the working rule in Canadian law, and it remains to consider the advisability of similar legislation in this country. The initial question, of course, is whether there is any sufficient justification for readjusting the burden of proof, whether there are 'stubborn facts' before which the 'cherished principle' of the common law must yield. A motor car does not fall within the category of dangerous things which a man uses at his peril,¹⁵ though its propensity to escape is increasingly evident and damage inevitably follows its escape. However that may be, it is submitted that the time has come when the law

⁸ [1932] A. C. at p. 699.

⁹ *Swadling v. Cooper* [1931] A. C. 1.

¹⁰ [1934] S. C. R. 71, construing a similar provision in (P. E. I.) Motor Vehicle Act, s. 65 (1).

¹¹ *Hanrahan v. McSween* (1935) 2 D. L. R. 670.

¹² S. 66 (1), amended by 1935, c. 82.

¹³ S. 88 (1), enacted by 1934-5, c. 6.

¹⁴ S. 58 (1), amended by 1935, c. 20, s. 8.

¹⁵ *Wing v. L. G. O. Co.* [1909] 2 K. B. 652, and cases cited by Dr. Stallybrass in 3 C. L. J. 384.

should take cognizance of the facts and cast a high degree of responsibility on those who bring a machine of such dangerous potentialities on the king's highway, whose constant user by pedestrians must be within their contemplation. If damage follows it is more equitable that the burden of disproving negligence should fall upon a person embarking on a course of conduct fraught with peril to pedestrians in the absence of a high standard of carefulness, than upon the ordinary user of the highway.¹⁶

Circumstances which may operate to shift the burden of proof.

1. *The principle of Res Ipsa Loquitur.*

The classic exposition of the doctrine of *Res ipsa loquitur* is the judgment of Erle C.J. in *Scott v. London & St. Katherine Docks Co.*¹⁷

'There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

It appeared at one time that the doctrine as applied to motor accident cases might be considerably extended by what has been called the 'dilemma' principle. In *Page v. Richards and Draper*¹⁸ the plaintiff whilst walking along the road was struck in the back by a motor car and the defendant never saw the plaintiff until he struck him. Rowlatt J. said:

'It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. . . . In a case like this, where a man is struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible then he was going too fast for the best look-out that could be kept.'¹⁹

¹⁶ It is interesting to consider in this connexion the legislative provisions as to aircraft contained in the Air Navigation Act, 1920. S. 9 of that Act provides *inter alia* that the owner of aircraft shall be absolutely liable for all actual damage done by it while in flight, whether to person or property, 'without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered . . .' For the effects of this provision see McNair, *Law of the Air*, pp. 81-2.

¹⁷ 3 H. & C. 596.

¹⁸ Unreported: cited at [1933] 2 K. B. at p. 457.

¹⁹ *Id.*

This dilemma principle was applied and confirmed in the later cases of *Tart v. G. W. Chitty & Co.*²⁰ and *Baker v. E. Longhurst & Sons, Ltd.*²¹

The ultimate result of a strict application of this rule would, it is submitted, be to cast the onus in the vast majority of cases on the defendant. The happening of an accident can, in the normal case, be due to one of two causes only, namely, inability to stop in time or failure to keep an adequate look-out. In either case, according to the decisions quoted, the defendant is *prima facie* guilty of negligence and it rests upon him to adduce evidence of extenuating circumstances.

The Court of Appeal, however, refused in *Tidy v. Battman* to recognize the 'dilemma' principle as a rule of law.²² In the words of Lord Wright M.R.:

'This is a pure question of fact. *Tart v. Chitty* and *Baker v. Longhurst* show that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt been properly applied in deciding other cases on other sets of facts.'²³

The doctrine of *res ipsa loquitur* has several times come before the Courts where a motor vehicle mounts the pavement and causes injury to pedestrians making use of it. There is some conflict, especially among the earlier authorities, as to the legal position of the driver in these circumstances. The difficulties are in all probability due to the inherent conservatism of the Common Law and its tardiness in adapting legal principles to changing social conditions. The vast increase, both in number and speed, of the vehicular traffic in a modern city has intensified the risks to which the pedestrian is subject, and there has in recent years been a tendency to increase the responsibilities of drivers of motor vehicles and, if their motor cars leave the roadway, to call upon them for an explanation of the accident. In the absence of such explanation, or if the explanation is unsatisfactory, the tendency is to hold the motorist responsible.²⁴

²⁰ [1933] 2 K. B. 453.

²¹ [1933] 2 K. B. 461. These were cases of contributory negligence but they are equally relevant to the question of the defendant's negligence.

²² [1934] 1 K. B. 319, 322. This criticism can be over-emphasized, since legal presumptions are arrived at by the transition of a rule of relevancy into a rule of law: see Cockle, *Cases and Statutes on Evidence*, 5th ed. p. 25.

²³ *Per Slessor L.J.*, *id.* at p. 322.

²⁴ For a further discussion see Terrell's *Law of Running-down Cases*, 2nd ed. pp. 7 *et seq.*

In *Hammack v. White*²⁵ the plaintiff, as administratrix of her husband, brought an action to recover damages for his death, which was due to his having been knocked down by the defendant whilst riding his horse. The deceased, at the time of the accident, was walking on the pavement. It was held that in the absence of any tangible evidence of negligence these facts disclosed no evidence of negligence which the judge was warranted in submitting to the jury. Erle C.J. put the matter quite emphatically:

'The plaintiff is not entitled to have his case submitted to a jury, unless he gives some affirmative evidence of negligence in the defendant.'^{25a}

But the germs of a contrary rule are disclosed in the following observation of Willes J.²⁶:

'The circumstance which weighed with me in the first instance was, that there was here a man riding on the footway, and, therefore, *prima facie* he was in the wrong. But the witness who proves this, also proves in the same breath that the horse was running away, and that the defendant was doing his best to prevent the accident. . . . The being on the footpath, therefore, is in itself no evidence of negligence and only shows that the horse was an unmanageable one.'

In the opinion of Willes J., therefore, there was no doubt that the riding of the horse on the pavement was in itself *prima facie* evidence of negligence, but in the circumstances of that case it was explained away by the plaintiff's own witness.

A precisely similar case was *Manzoni v. Douglas*,²⁷ the facts and effect of which are summarized in the judgment of Lindley J.²⁸:

'The plaintiff was lawfully walking on the foot-pavement of a public thoroughfare and was knocked down by a horse drawing the plaintiff's brougham. If the case had been left there, it might be that the defendant was liable for negligent driving of her servant. But the explanation was given by the plaintiff's witnesses, *viz.* that the horse had bolted and the defendant's coachman had lost all control over it. . . . We have no evidence that it was caused by the driver's negligence or want of care.'

Here again it will be seen that the *prima facie* case of negligence which arose from the circumstances of the accident was rebutted by the evidence of the plaintiff's own witnesses.

²⁵ (1862) 31 L. J. C. P. 129; 11 C. B. (N.S.) 588.

^{25a} 31 L. J. C. P. at p. 130.

²⁶ *Id.* at p. 131.

²⁷ (1881) 6 Q. B. D. 145.

²⁸ *Id.* at p. 153.

The Courts have seized on these tentative suggestions to extend to this class of cases the operation of the doctrine of *res ipsa loquitur*. Thus in *Gayler & Pope, Ltd. v. Davies & Sons, Ltd.*²⁹, McCardie J. adopted the *dictum* of Lindley J.³⁰ as an accurate statement of the law and added³¹:

'I assent to the view expressed by an eminent Canadian judge who said: "I think the reasonable view of the law, and of the ordinary transactions of human life is, that if a man's horses galloping through the street run on and injure a passenger on the sidewalk, a case of *prima facie* wrong is shown. It may be fully explicable but I think it calls for explanation": *per* Hagarty C.J. in *Crawford v. Upper* (1889) 16 Ont. App. 440, 444.'³²

The question again came up for decision in *Wing v. L. G. O. Co.*³³ In that case the defendant's motor omnibus, in which the plaintiff was a passenger, skidded upon a greasy road and ran into an electric light standard, and in so doing injured the plaintiff. The case eventually came before the Court of Appeal, which had to decide *inter alia* whether the mere happening of the accident constituted a *prima facie* case against the owners, that is, whether this was a case of *res ipsa loquitur*. It was held that 'an accident resulting from the tendency of motor omnibuses, however constructed and designed, to skid is no evidence of negligence'.³⁴ Adverting to the question of *prima facie* negligence, Fletcher Moulton L.J. said:

'In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control. Hence the fact that an accident has happened to or through a particular vehicle is by itself no evidence that the fault, if any, which led to it was committed by those in charge of that vehicle.'³⁵

²⁹ [1924] 2 K. B. 75.

³⁰ *Supra*.

³¹ *Id.* at p. 85.

³² Cited in Beven on Negligence, vol. i, p. 123.

³³ [1909] 2 K. B. 652.

³⁴ *Per* Vaughan Williams L.J. at p. 662.

³⁵ P. 663.

It is difficult to follow this argument, for the application of the principle of *res ipsa loquitur* to these cases does not involve casting upon the defendant any responsibility for the actions or behaviour of others; the essential test in all cases to which the doctrine applies, given the element of control, is whether the accident in question was more consistent with the absence of due care than with its exercise. It is submitted that it would have been sufficient in *Wing's Case* to have treated the proof that the omnibus skidded in the same way as the plaintiff's evidence in *Manzoni v. Douglas*,³⁶ i.e. as affording an explanation in rebuttal of the *prima facie* case against the defendant.³⁷

The earlier cases of *Isaac Walton & Co., Ltd. v. Vanguard Motor Bus Co., Ltd.*³⁸ and *Barnes Urban District Council v. L. G. O. Co.*³⁹ are in direct conflict with *Wing v. L. G. O. Co.* if that case is taken to have the wide effect which seems to have been intended by Fletcher Moulton L.J. In the first case a Divisional Court had to consider whether the fact that a motor omnibus struck a lamp-post on the pavement was or was not by itself *prima facie* proof of negligence on the part of the driver. The Court decided that if those facts alone were proved then there was evidence upon which a jury might find that the driver of the omnibus was guilty of negligence. In the second case the same principle was upheld also by a Divisional Court. If the more restricted view is taken of the operation of *Wing's Case* the authority of these two cases is unimpaired.⁴⁰ Great weight is lent to this view by the recent decision of the Divisional Court in *Ellor v. Selfridge*.⁴¹ In that case the plaintiffs were standing on a pavement in a public street with their backs to the traffic when the defendants' motor van came behind them, mounted the pavement and knocked them both down. The van finished its course with all four wheels on the pavement. The defendants contended that the onus of proof of negligence was on the plaintiffs and called no evidence on their own behalf at the trial. The County Court judge held that there was some

³⁶ *Supra*, p. 409.

³⁷ As in *Hinton v. Gilchrist*, Times, March 8, 1930, where the defendant's motor car had mounted the pavement and killed the plaintiff's son. There was evidence that the car had skidded very badly some thirty-four yards away from the point of the accident and that after an erratic course it was only stopped by the shop doorway in which the plaintiff's son was standing. The county court judge decided that the evidence negatived all suggestion of negligence on the part of the defendant. His decision was upheld on appeal by the Divisional Court.

³⁸ (1908) 72 J. P. 505; 25 T. L. R. 13.

³⁹ (1908) 100 L. T. 115.

⁴⁰ This is the view adopted by Mr. Edward Terrell, *The Law of Running-down Cases*, 2nd ed. p. 14, where all the cases are fully discussed.

⁴¹ 46 T. L. R. 236.

evidence of negligence and awarded damages to the plaintiffs. Scrutton and Romer L.JJ., sitting as a Divisional Court, upheld his decision on the ground that the fact that the motor van appeared on the pavement, where it had no business to be, and injured the plaintiffs on the pavement, and the further fact that the defendants offered no explanation why their van was there, seemed to be more consistent with negligence than with the exercise of reasonable care.⁴²

Moreover, the *dictum* of Fletcher Moulton L.J. in *Wing's Case* incurred disapproval and criticism by the Court of Appeal in *M'Gowan v. Stott*.⁴³ The facts of that case as they appear from the judgment of Scrutton L.J. were that the plaintiff who was injured was walking along a well-defined footpath, and the defendant's motor vehicle, driven by one of his servants, mounted the footpath and struck him in the back. The evidence was that there was nothing in the nature of skidding and all the circumstances tended to show that the vehicle came straight on to the footpath and that it was not a case of skidding. The damage was such as to lead to the conclusion that the car was travelling at a considerable speed.

At the close of the plaintiff's case the defendants' counsel submitted that the case was covered by *Wing v. L. G. O. Co.*, and that the plaintiff ought to be non-suited. The trial judge thereupon gave judgment for the defendants. The Court of Appeal reversed this decision and ordered a new trial. Both Bankes L.J. and Scrutton L.J. considered Fletcher Moulton L.J.'s *dictum* in *Wing's Case*. Bankes L.J. considered that that statement had no application to the case before him and moreover 'it may be necessary at some time to consider whether the learned Lord Justice there did not really lay down the rule in wider terms than was originally laid down, and in terms that were wider than the rule, properly expressed, or accurately expressed, justifies. . . . I venture to think that the learned Lord Justice would not have used that language if he had in mind such a case as the present.'⁴⁴ Scrutton L.J., said ⁴⁵:

'I think the learned Lord Justice [Fletcher Moulton] . . . was going considerably beyond anything that had been said in the case of *Scott v. London & St. Katherine Docks Co.* . . . When you get to the case of a man standing still in the highway in broad daylight and run into, I think that would be *prima facie* evidence of

⁴² Scrutton L.J. based his decision on the *dictum* of Willes J. in *Hammack v. White*, quoted *supra*, p. 409.

⁴³ (1930) 99 L. J. K. B. 357.

⁴⁴ 99 L. J. K. B. at p. 358.

⁴⁵ *Id.* at p. 359.

negligence of the driver of the vehicle that ran into him. You may have a different law with regard to horses because, as appears from *Hammack v. White*, horses, properly managed, may show such uncontrollable temper . . . that they bolt even if properly managed. . . . But those cases are not this case. Here we have a man where he has a right to be and a motor where it *prima facie* has no right to be,⁴⁶ and on the evidence given by the plaintiff there are two possible causes of its getting there without negligence, skidding or being knocked there by another vehicle, excluded by the evidence altogether. In those circumstances, it appears to me that it is a matter which comes exactly within the definition of *Scott v. London & St. Katherine Docks Co.* In my opinion the learned judge was wrong in withdrawing the case from the jury.'

Atkin L.J. (as he then was) added a warning note as to the danger of obscuring the issue by a too ready reliance on particular formulae⁴⁷:

'I am not sure that the simple issue is not sometimes obscured by referring to a particular formula such as *res ipsa loquitur*. After all, all that one wants to know is whether the facts of the occurrence do as a matter of fact make it more probable that a jury may reasonably infer that the damage was caused by want of care on the part of the defendants than the contrary. The rule that has been applied as the rule that helps one is the rule laid down in *Scott v. London & St. Katherine Docks Co.*'

The Court of Appeal again had occasion to apply the rule in *Scott v. London & St. Katherine Docks Co.* in the case of *Halliwell v. Venables*.⁴⁸ The facts are thus stated by Scrutton L.J.⁴⁹:

'In the present case the defendant was driving a fast small sports motor car. . . . It was a dark night, a dry night; broad road; no other traffic; slight bend; statement by the man driving that he was going at thirty-five miles an hour and that he was driving with one hand only on the wheel, as is his usual practice; motor car found to have turned over and apparently bounded along the road, and possibly to have turned over twice; a good deal of damage to the offside of the motor car; passenger [the plaintiff] thrown out on the right-hand side of the road; motor car found some way off the road on the left-hand side of the road. All that it is necessary for this judgment to say is that, given those facts, it appears to me that they require explanation by the person driving the motor car. The Judge ought not to withdraw the case from the jury as the above facts constitute an accident which would not usually happen with proper driving, and the person who could explain it, or give evidence about it, does not go into the box to explain it.'

⁴⁶ Cf. *Ellor v. Selfridge*, *supra*, p. 411.

⁴⁷ *Id.* at p. 360.

⁴⁸ (1930) 99 L. J. K. B. 353.

⁴⁹ *Id.* at p. 355.

It appears, therefore, from a consideration of the foregoing cases, that before the English plaintiff can attain the more favourable position of his Canadian cousin he must show that the accident was such 'as in the ordinary course of things does not happen if those who have the management use proper care', or in other words he should be careful to see that he is knocked down on the pavement and not in the road.

2. Breach of Statutory Regulations.

The motorist's use of the road has always been subject to the observance of the 'rule of the road' and is now governed by a large number of regulations made under the Road Traffic Acts. The older authorities clearly lay down that the mere infringement of a rule of the road is not necessarily proof of negligence on the part of the offender,⁵⁰ and so, in *Lloyd v. Ogleby*,⁵¹ it was held that the mere fact of a man's driving on the wrong side of the road was no evidence of negligence in an action brought against him for running over a person who was crossing the road on foot. These cases were decided a long time ago when the condition of the roads was in no way comparable to modern conditions and it may be that a different view would be taken by the Courts at the present day. Moreover, the circumstance that the defendant, at the time of the accident, was travelling on the wrong side of the road, though admittedly not proof of negligence, surely casts upon the defendant the duty of giving some explanation.⁵²

Many of the rules of driving have now been embodied in the Highway Code issued under powers conferred by the Road Traffic Act, 1930. It is by no means clear what effect these regulations have on civil actions. It is provided by section 45 (4) of the Act that 'a failure on the part of any person to observe any provision of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings . . . be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings'. The Act does not go so far as to say that a breach shall constitute a *prima facie* case of negligence, nor does it exclude the ordinary defences of contributory negligence or inevitable accident. On the whole it would seem that if the

⁵⁰ *Wayde v. Carr (Lady)* (1823) 2 Dow. & Ry. K. B. 255.

⁵¹ (1859) 5 C. B. (N.S.) 667.

⁵² It is difficult to see why the same considerations should not apply here as where the accident occurs on the footpath.

plaintiff proves a breach by the defendant and that that breach contributed to the accident he has discharged his onus of proof and, in the absence of any explanation by the defendant, would be entitled to judgment.

The Act of 1930 imposes speed limits on certain classes of vehicles and this policy is carried farther by the Act of 1934 which imposes a general speed limit of thirty miles an hour in 'built-up areas'. Any person who commits a breach of these provisions is guilty of a criminal offence and is liable to be fined therefor. It seems impossible to escape the conclusion that where the Legislature, in the interests of public safety, has imposed an absolute duty on road users any failure to comply with such regulation must raise a *prima facie* case of negligence against the wrongdoer in the event of an accident taking place whilst he is thus contravening the statutory rule. It is open to him to adduce explanations and to plead any of the usual defences to an action for negligence, but in the absence of such explanation the Court must find against him. Although this would seem the logical view to take there are several decisions under the earlier Road Traffic Acts which are in direct conflict with such a principle.

Thus in *Lankester v. Miller, Hetherington*⁵³ the driver of a motor vehicle, when nearing a cart and horse, knowing that his hooter was out of order slowed down to six miles an hour. When the car came abreast of the cart the horse became frightened and bolted. The driver was thrown and fatally injured. Under the Motor Car Act, 1903, it was an offence not to carry a bell or other means of giving notice of approach of a motor vehicle. Nevertheless it was held that the mere breach of the regulations under the Act of 1903 was not necessarily evidence of negligence. But the actual ground of the decision was 'that the breach of the regulations was not the *causa causans* of the accident—was not such negligence, if negligence it was, as would have entitled the applicant to have maintained an action under Lord Campbell's Act'.⁵⁴

In *Phillips v. Britannia Hygienic Laundry Co., Ltd.*,⁵⁵ a motor lorry was being driven along a highway. Through no fault of its owners the lorry was in such a condition as to cause damage to persons on the lorry in that one of its axles was defective. The axle broke and a wheel came off and damaged another vehicle. The driving of a motor vehicle in such a

⁵³ [1910] 4 B. W. C. C. 80 (C. A.).

⁵⁴ *Id.* at p. 83, *per* Cozens-Hardy M.R.

⁵⁵ [1923] 2 K. B. 832.

condition is a breach of the Motor Cars (Use and Construction) Order, 1904, art. II, reg. 6. It was held that the mere breach of the Order did not give the plaintiff any right of action; that it was not intended by the Act⁵⁶ or the Order that everyone injured through a breach of the Order should have a right of action for damages; but that the duty imposed by the Order was a public duty only to be enforced by the penalty imposed for the breach of it, and not otherwise. Neither of these cases, however, is inconsistent with the principle that once it is proved that the defendant has been guilty of a breach of a statutory regulation there is cast upon him the duty of disproving negligence. Thus in *Phillips' Case* the owners conclusively showed that there was no negligence on their part, and in *Lankester v. Miller* there was no sufficient connection between the breach and the accident.

In *Bailey v. Geddes*⁵⁷ the Court of Appeal had to consider the effect on an action of negligence of a breach of regulations relating to pedestrian crossings under section 18 of the Road Traffic Act, 1934. By this section the Legislature has given tardy recognition to the pedestrian's need to cross the road and his right to protection when doing so. It is provided by section 18 (1) of the Road Traffic Act, 1934, that 'crossings for foot-passengers may be established on roads in accordance with the provisions of this section'.⁵⁸ The section authorises the Minister of Transport to make regulations with respect to the precedence of vehicles and foot-passengers respectively and generally with respect to the movement of traffic at or in the vicinity of a crossing. Acting under the statutory power so conferred the Minister has issued regulations known as the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, whereby it is provided *inter alia*:

(1) The driver of every vehicle approaching a crossing⁵⁹ shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

⁵⁶ Locomotives on Highways Act, 1896.

⁵⁷ [1938] 1 K. B. 156.

⁵⁸ In a Canadian case it has been decided that where a city by-law prohibits pedestrians from crossing a street except at street intersections a motorist is not bound to keep that same constant look-out for pedestrians crossing between the street intersections that is required of him when pedestrians can lawfully cross in the middle of a block: *Chester v. Kinnear* (Alberta) (1927) 1 D. L. R. 47. Thus it is reasonable to assume that the onus on a plaintiff injured while crossing at an unauthorised place will be heavier even in cases where the regulation is as respects him permissive.

⁵⁹ 'Crossing' means a crossing-place for foot-passengers indicated by a traffic sign prescribed for the purpose by regulations made by the Minister: Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, para. 2.

(2) The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot-passenger who is on the carriageway at such crossing, and every foot-passenger shall have precedence over all vehicular traffic at such crossing.⁶⁰

The facts in *Bailey v. Geddes* were simple. A pedestrian who was crossing the road by a pedestrian crossing was knocked down and injured by a motor car as he was about to step on to the opposite kerb. The Court held that the driver of the car was liable, as the cause of the accident was the failure to observe the Crossings Regulations, 1935, which have the force of a statute. Further, although admitting that the defence of contributory negligence may be available in an action based on breach of a statutory duty, their lordships held that no such defence is available where a breach of these regulations is proved. The duty of a driver of a vehicle 'is to stop outside the crossing and therefore it is impossible that what is done inside the crossing can be the fault or the negligence of the plaintiff himself, because, if the regulations had been obeyed, there would have been no car upon the crossing at all which could on any view have injured the plaintiff'.⁶¹ This case, it is submitted, is authority only for the particular regulations which were there considered. The whole question of the effect on civil actions of the various regulations made under the Acts would benefit by reconsideration by the Courts. The question is not so much one of the intention of the Legislature as the effect of the particular regulation on the common law. The Court has to consider the operation of the common law as modified by the regulation. Thayer suggests the following line of reasoning.⁶² You ask yourself by what tests the defendant's liability would have been determined before the date of the regulation and whether those tests are necessarily affected by its enactment. If the question whether a particular course of conduct was or was not negligent was left to the jury, the reasonableness of the defendant's conduct was in the eye of the law an open question, depending on the circumstances and the inferences reasonably to be drawn from them. 'Suppose now the situation to be changed by the single circumstance of the ordinance, all other facts remaining the same. Can the issue of negligence any longer be left to the

⁶⁰ A fine not exceeding forty shillings is imposed on every person committing a breach of these regulations.

⁶¹ [1938] 1 K. B. 166, *per* Slesser L.J.

⁶² 'Public Wrong and Private Action', E. R. Thayer, 27 Harv. Law Rev. 317.

jury? Not unless they would be justified in finding for either party; and what must a finding for the defendant on this issue mean? That an ordinary prudent man knowing the ordinance—for upon familiar principles he can claim no benefit from his ignorance of the law—would have chosen to break it, reasonably believing that damage would not result from his action. It must upon this view be deemed consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority, for the ordinance has prohibited [this course of conduct] and has done this to prevent just such consequences as have occurred.’

The logical corollary of this line of reasoning is that any breach of a statutory regulation is negligence *per se*. The Legislature has labelled a particular course of conduct ‘dangerous’ and contrary to the public interest. In other words the Legislature has usurped the function of the reasonable and prudent man, and it is difficult to resist the inference that conduct in defiance of this ordinance is negligence *per se*.⁶³

We are not concerned here to do more than touch upon the question of breach of statutory duty since all that we have sought to establish is that once a breach of the statutory regulation is proved the defendant must discharge the onus of disproving negligence. There is a *prima facie* case against him and if he fails to give a satisfactory explanation judgment must be given against him. It is not our purpose to consider at any length the question of breach of statutory duties since all that it is intended to suggest is that where the Legislature in the interests of public safety has imposed a positive duty on road users any failure to comply with such regulations must raise a *prima facie* case of negligence against the wrongdoer in the event of an accident taking place whilst he is thus contravening a statutory rule. It is then for the defendant to discharge the onus of disproving negligence, and if he fails to give a satisfactory explanation judgment must be given against him.

The wide rule laid down by the Court of Appeal in *Bailey v. Geddes* in the case of pedestrian crossings and the suggested rule in the case of other regulations substantially improve the position of the plaintiff pedestrian in cases to which they apply. But this relief is limited by the fact that pedestrian crossings occur in general only in urban areas and the speed limit applies only in ‘built-up’ areas.

⁶³ Cf. *Bailey v. Geddes*, *supra*, and see also *Lochgelly Iron and Steel Co. v. M'Mullan* [1934] A. C. 1, ‘statutory negligence’.

It may be urged that the operation of the common law rule does not normally work any great injustice. It is only in exceptional cases that a case is withdrawn from the jury, and in the majority of these actions each side puts its whole case before the Court at once and the case is decided after careful weighing of the evidence on one side against that on the other. But hard cases do occur and with the law in its present state there is obviously scope for confusion and differing interpretations. The enactment of a uniform rule casting the onus on the motorist in every case would be a contribution to the clarity and to the satisfactory working of the law. As we have attempted to show, there would be less injustice in throwing the burden on the motorist, and, in the author's opinion, it would represent a logical and desirable step in the campaign for road safety which is at last being energetically pursued.

Our very hearty congratulations to Dr. McNair on his translation to the Vice-Chancellorship of Liverpool University must be tempered by our equally deep regret that he has left Cambridge. He is 'changed from glory unto glory', but the vacancies which his departure creates in the University, in his College and in the Law School are not easily to be filled. It is rare indeed to find one who combines such great talents in administration, scholarship and teaching as Dr. McNair possesses. Equally notable are the patience and kindness with which he always places them at the disposal of his pupils, his colleagues and those concerned with the wider world of affairs that lies outside Cambridge. Fortunately, we need not regard his high office at Liverpool as a severance of his relations with the old University; far from it, we feel sure that it will strengthen greatly the ties between ourselves and one of the great Universities of the North.

We are delighted to add a warm welcome to Professor Lauterpacht, who has succeeded Dr. McNair in the Whewell Chair of International Law.

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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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NOTES ON RECENT CASES.

BAILMENT—MOTOR CAR PARKED UNDER AGREEMENT FOR FEE ON PRIVATE GROUND—CONDITIONS IMPOSING ALL RISK ON CAR OWNER—CAR STOLEN THROUGH NEGLIGENCE OF ATTENDANT—HELD: NO CONTRACT OF BAILMENT, BUT MERE LICENCE, AND OWNERS OF CAR PARK NOT LIABLE.

Ashby v. Tolhurst. [1937] 2 K. B. 242.

THE plaintiff left his car in the defendants' car park, obtaining from the attendant a ticket containing a receipt for the parking fee, followed by the provision: 'The proprietors do not take any responsibility for the safe custody of any cars or articles therein nor for any damage to the cars or articles however caused . . . all cars being left in all respects entirely at their owners' risk.' The owner returned to find that the car had been stolen, negligence on the part of the attendant being admitted. The car was never recovered.

In the county court the defendants were held liable on the grounds of (a) breach of a contract of bailment, the conditions on the ticket operating at least to imply a term that the defendants would not hand over the car to anyone except on production of the ticket, and (b) conversion, by misdelivery on the part of the attendant.

The Court of Appeal unanimously reversed this decision. The Court held that it was impossible to infer any contract of bailment, as there was no evidence pointing to any delivery of possession. The suggestion that possession was delivered for safe custody was refuted by the terms of the conditions. The contract merely entitled the plaintiff to leave his car on the defendants' premises; it amounted to no more than a mere licence. In view of there being no delivery of possession it was impossible to infer a term that the defendants were to redeliver the car only on production of the ticket.

Sir Wilfrid Greene M.R. added, *obiter*, that even if there were a contract of bailment, and even if the attendant's act were within the scope of his authority, the conditions were sufficient to protect the defendants from liability for their own and for their servants' negligence. He cited (at p. 253) as authority Scrutton L.J. in *Gibaud v. G. E. Ry.* [1921] 2 K. B. 426, 437. Romer L.J. (at p. 256) preferred in the circumstances not to 'deal further with the numerous authorities, not all of them very easily reconcilable', relating to the extent to which a bailee may by contract reduce his liabilities.

With regard to conversion, it was held that even if there had been a bailment of the car, the most that could be imputed to the defendants was negligent misdelivery, from liability for which they were protected by the conditions. Romer L.J. pointed out (at pp. 256-7) that there might be conversion even without previous delivery. He quoted Atkin J. (as he then was) in *Lancashire and Yorkshire Ry. v. MacNicol* (1918)

118 L. T. 596, 598: 'It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion . . . providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.' There was no evidence whatever of any such intention on the part of the attendant.

The question whether a car owner availing himself of a private car park should not more properly be termed an invitee is irrelevant in this context. What is important is that, in the absence of evidence showing some reason for delivery of possession, no contract of bailment will be implied, and the resulting relationship between the parties is not such as to preclude the car park owner from being released by contract from liability for his own negligence, at least in respect of the other party's property.

It has been pointed out that the plight of the car owner is perhaps not quite so insecure as might appear from this case (53 L. Q. R. 301-2).

B. K. H.

CONFLICT OF LAWS—CHARGE EXECUTED IN SCOTLAND BY ENGLISH COMPANY ON SCOTTISH MOVABLES—EFFECT OF CHARGE DURING SUBSEQUENT COMPULSORY LIQUIDATION—COMPANIES ACT, 1929.

Re Anchor Line (Henderson Brothers), Ltd. [1937] Ch. 483.

THE Anchor Line, a shipping company registered in England but owning heritable and movable property in Scotland, executed a charge in Scotland covering all its assets and property present and future as security and ranking this as the primary charge against the property.

The charge was registered in England and before a voluntary agreement was effected a liquidator was appointed to wind up the affairs of the company. The liquidator sought to have it determined whether an effective charge had been created with respect to the Scottish assets of the company.

Luxmoore J. held that, despite the fact that the charge was executed in Scotland where such an instrument is unknown, it was to be construed according to English law and was therefore a valid charge. In addition, in response to counsel's contrary contention, he held that section 270 of the Companies Act, 1929, does not place Scottish property belonging to an English company on a different footing from that of its other property. The proceeds of the sale of the Scottish property, therefore, were subject to the charge.

The learned judge laid emphasis on *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 1 Ch. 354, 387 (affirmed by C. A. [1910] 2 Ch. 502; unaffected by reversal on another point by H. L. [1912] A. C. 52) and other cases to substantiate the principle that the Court, through its equitable powers, could enforce its decrees concerning property in a foreign land. It is interesting to note that these cases refer to immovable property. However, this equitable power of the Court to do indirectly what it would not dare to do directly is no longer questioned.

Some Courts under the Anglo-American system of law have found it rather difficult, despite the anomalous power in equity, to give legal effect to the act done or agreement made in a country where the law of that country failed to attach legal significance to that act or agreement.

Luxmoore J. inferred the intention of the parties that the agreement should be governed by English law although it was made in Scotland concerning Scottish property and between an English company and a Scottish bank. Of course, as such a charge as the parties sought to create is unknown to Scottish law, the only method of validating the agreement was by applying English law. The rule of the proper law of contracts which allows the parties a choice of law, however limited, must remain so uncertain that any benefits derived from its elasticity might seem to be of a minor aspect.

Dr. Cheshire (*Private International Law* (2nd ed.), p. 573) believes that the English Courts will use this power of action '*in personam*' to prevent an injustice being done. It may be said that the power was used in our present case for a similar purpose. But in *Inglis v. Robertson* [1898] A. C. 616 it was held that a pledge agreement between an Englishman and a Scotsman concerning movables in Scotland was to be judged according to Scots law, although void by that law.

A further argument was that by the Companies Act, 1929, s. 270, the charge was to be ignored and the property distributed among the unsecured creditors of the company. But Luxmoore J. construed the section as referring merely to the collection of assets by the liquidator, not to their distribution by him.

K. M. R.

CONFLICT OF LAWS—JURISDICTION IN NULLITY—BIGAMY—DOMICIL OR RESIDENCE—DOMICIL OF MARRIED WOMAN.

White (otherwise Bennett) v. White. [1937] P. 111.

In 1926 the woman petitioner, who resided and was domiciled in England, while visiting Australia, went through a ceremony of marriage there with the respondent. The respondent was resident and domiciled either in Australia or in Malta. Two days later the petitioner returned to England, and did not visit Australia again until 1927, when she found that the respondent was living with his lawful wife whom he had married in 1908. In 1929 the petitioner returned to England where she continued to reside up to the time of this petition, which was for a decree of nullity on the ground that when she went through the ceremony of marriage with the respondent he had a wife who was still alive. The respondent formally admitted in writing that at the time of the ceremony of marriage with the petitioner he was a married man. A question having been raised as to the jurisdiction of the English Court to grant such a decree:—Held, by Bucknill J.: (1) that the petitioner had never acquired the domicile of the respondent, either in law or in fact, and that she was still domiciled in England; (2) that as the respondent had not objected to the jurisdiction of the English Court, it was just to the petitioner, being resident in England, that she should have her status established here, and (3) that therefore the Court had jurisdiction to grant the decree.

There appears to be authority for saying that in suits for nullity based on a void marriage the domiciliary Court has jurisdiction. The question here was whether residence might also give jurisdiction, and in coming to the conclusion that it did Bucknill J. had to distinguish two recent cases, *Inverclyde v. Inverclyde* [1931] P. 29, and *Salvesen v. Administrator of Austrian Property* [1927] A. C. 641.

In the *Inverclyde Case* there was a petition for nullity on the ground of impotence, which made the marriage voidable merely and consequently involved a question of status. As the parties were not domiciled here, the Court refused jurisdiction. But Bucknill J. distinguished this case on the ground that it was no authority on a case involving a void marriage. Indeed Bateson J. in the *Inverclyde Case* had said (at p. 48): 'In truth bigamy cases help very little, as in them as distinct from this, there never has been a marriage. . . .'

The *Salvesen Case* concerned a petition in Germany for a decree of nullity on the ground that formalities in the marriage had not been observed; this would make the marriage void *ab initio*. Both parties being resident and domiciled in Germany, the House of Lords decided that the German Court had jurisdiction to grant the decree. The case therefore decides that jurisdiction in nullity may be based on domicile. Indeed Lord Phillimore (at p. 671) went so far as to say (*obiter*) that the foreign Court had exclusive jurisdiction. But the learned judge said that in the *Salvesen Case* both parties were in fact domiciled in Germany, whereas in the case before him the petitioner never had the same domicile as the respondent. He said (at p. 123): 'It seems to me that it would be quite unsound to hold that in the case now before me the petitioner ever acquired the domicile of the respondent, either in law or in fact.'

Further, the decision in *Roberts v. Brennan* [1902] P. 143 was most apposite. The facts there were almost identical with those under consideration, and Jeune P. said (at p. 144): 'In my view residence—not domicile—is the test of jurisdiction in a nullity case.'

Though the learned judge was much moved by the justice of the petitioner's case, it is respectfully submitted that he was fully justified in not treating all nullity suits on the same principle as divorce; indeed that principle has worked such great injustice (see *Lord Advocate v. Jaffrey* [1921] A. C. 146; *Att.-Gen. for Alberta v. Cook* [1926] A. C. 444) that relief has now been provided in section 13, Matrimonial Causes Act, 1937. If there is anything on which we would have expressed doubts it is the passage (at p. 125) where the learned judge says that if the respondent had protested against the jurisdiction he would have doubted whether it existed. Strictly, we would have thought that either the jurisdiction was there or it was not. Moreover, there seems authority for saying that a woman acquires the domicile of her husband by virtue of the marriage ceremony without more.

[See 53 L. Q. R. 315; *Law Times*, March 6, 1937, p. 185; *Journal du droit International*, No. 3, 1937, p. 592.]

T. C. T.

CONSTITUTIONAL LAW — DIVIDED LEGISLATIVE POWERS IN CANADA —
ENFORCEMENT OF TREATY OBLIGATIONS — EXCLUSIVE PROVINCIAL
AUTHORITY IN CERTAIN CLASSES OF SUBJECTS—INVALID LEGISLATION
BY THE DOMINION.

Attorney-General for Canada v. Attorney-General for Ontario and Others.
[1937] A. C. 326.

THE Judicial Committee of the Privy Council had to consider the validity of the Weekly Rest in Industrial Undertakings Act, and of two

similar Acts passed by the Parliament of Canada to give effect to certain Draft Conventions of the International Labour Organization of the League of Nations. This was an appeal from the Supreme Court of Canada, where the judges had been equally divided.

The appellants relied on section 132 of the British North America Act, 1867, which assigns to the Dominion Parliament legislation "necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries". They contended that this section could legitimately be extended to cover a convention ratified by Canada in her new international status, citing *Re The Regulation and Control of Radio Communication in Canada* [1932] A. C. 304.

The respondents denied the applicability of section 132. They urged that the obligations were not incurred by the Dominion in conformity with section 405 of the Treaty of Versailles, 1919, as the Provinces had not been first consulted; and that the legislation was exclusively assigned to the Provincial Legislatures under section 92 of the British North America Act, as it concerned matters coming within 'Property and civil rights in the Province'.

Lord Atkin delivered their Lordships' judgment for the respondents. The case could be decided on the question of legislative competence alone. The Provinces were the sole authorities competent to enact the legislation (under section 92); and though the treaty-making power lay with the Dominion, yet in cases such as this the Dominion had to risk the assent of the Provinces. There existed an obligation to consult them which had not here been fulfilled. The *Radio Case*, which had extended section 132 to give the Dominion the required powers, was distinguishable, as its subject-matter did not fall within section 92. The three laws, therefore, were *ultra vires* of the Parliament of Canada. It is hard to see why the broad interpretation of section 132 in the *Radio Case* should not have applied here. If that interpretation is accepted law, the distinction drawn by Lord Atkin hardly seems fully to dispose of it. The wording of section 132 clearly implies an overriding power in certain circumstances; and, once the section can be made applicable, it should be decisive. It is then immaterial whether or not section 92 would otherwise apply. On constitutional principles, however, the Privy Council's judgment in the present case seems preferable. The new international status of Canada gives the Dominion Legislature a freedom from responsibility not previously enjoyed. It cannot be desirable that that Legislature should be able to invade the rights of the Provinces merely because the matter in question can be made the subject of an international bargain.

H. W. R. W.

CONTRACT—INFANT—HIRE—PURCHASE OF A LARGE AND EXPENSIVE MOTOR LORRY HELD NOT TO BE A NECESSARY OR A CONTRACT FOR THE BENEFIT OF THE INFANT.

Mercantile Union Guarantee Corporation, Ltd. v. Ball.
[1937] 2 K. B. 498.

THE plaintiffs in this action claimed £97 7s. 6d. from the defendant as arrears due under a hire-purchase agreement for a motor lorry

costing £666. The defendant, aged twenty years, acquired the motor lorry for use in his trade as haulage contractor. After two years he got into financial difficulties and fell into arrears with his payments. On being sued he pleaded infancy.

The county court judge held that the contract was not for his benefit and that he was not liable.

The Court of Appeal affirmed this decision. The defendant was not bound by the contract: because (1) it did not come within the class of contracts by which an infant could bind himself; and (2) it was not for the benefit of the infant. The Court quoted Coke upon Littleton as to contracts by which an infant could bind himself, especially those for 'necessaries', and pointed out that later authorities had added contracts of service. Regarding trading contracts Bray J. in *Cowern v. Nield* [1912] 1 K. B. 419, 424 said, 'But in my opinion there is no authority for saying that a trading contract, even if for the benefit of the infant, is an exception to the rule that an infant is not, except in certain cases, liable on a contract made by him'.

The real ground for the decision was the fact that the Court of Appeal found it impossible to differ from the view taken in the Court below that the purchase of a large and expensive motor lorry on onerous hire-purchase terms was not a contract for the benefit of the infant.

At common law an infant was in general not bound by his contracts with the exception of those for necessities, and contracts of service and apprenticeship were added to the exception in the course of years. *Cowern v. Nield* decided that a contract by an infant to sell goods in the way of trade was not enforceable against him.

The real test whether the contract is for the benefit of the infant or not is whether it is beneficial at the time when it is entered into, and not whether it ultimately turns out for his benefit. The Court of Appeal did not accept the argument that the contract was for the infant's benefit at the time he entered into it as it enabled him to make increased profits, his later failure to do so being due to the imposition by the Government at a later date of an increased tax on heavy oil.

B. P.

CONTRACT — INTERPRETATION — FORBEARANCE TO REPORT DEFAULT ON A GAMBLING DEBT TO TATTERSALL'S IN CONSIDERATION OF DELIVERY OF CHATELS AND PAYMENT OF SUM OF MONEY BY INSTALMENTS — EVIDENCE OF VALUE OF CHATELS HELD ADMISSIBLE TO GIVE BUSINESS EFFICACY TO AGREEMENT.

Latter v. Colwill. (1937) 53 T. L. R. 333.

THE defendant was indebted to the plaintiff in the sum of £266 17s. 6d. in respect of betting transactions. The defendant, in consideration of the plaintiff's forbearing to press his claim before Tattersall's Committee and on the understanding that no other steps should be taken which might be detrimental to him (the defendant), agreed to hand over to the plaintiff two bronzes and to pay him two instalments of £20 each on specified dates in the settlement of the debt. He further agreed that should he default

in the 'surrender of my bronzes and/or in the due payment of any instalment, I agree that the whole then remaining balance of the original sum above mentioned shall become due and payable forthwith'.

The defendant handed over the bronzes and paid the first instalment of £20, but he did not pay the second instalment of £20. The plaintiff sued him for the balance due after giving credit for the £20 already paid, together with a sum of £28 as representing the value of the bronzes.

MacKinnon J. gave judgment for the plaintiff for £20, holding that the agreement meant that the debt was to be satisfied by delivery of the bronzes and payment of two instalments of £20. He refused to admit evidence that the bronzes were valued at £28. The Court of Appeal (Scott L.J. dissenting) reversed this decision.

Greer L.J. expressed agreement with 'the well-known proposition that evidence cannot be given of the negotiations when those negotiations have resulted in a written agreement. But [he added] evidence can always be given for the purpose of interpreting the agreement, and of the surrounding facts—of the circumstances in which the agreement was signed'. Later, he said: 'The last clause of the agreement was intended to mean something. It was intended to mean that the balance of the original sum above mentioned was to be paid forthwith.' The balance could only be ascertained by fixing the value of the bronzes; and evidence was admissible for that purpose.

It is submitted that the decision of the Court of Appeal in admitting evidence as to the value of the bronzes was correct; but that further consideration might have been given to the contention that the second clause of the agreement was in the nature of a penalty. Slessor L.J. thought that the case fell within a *dictum* of Bramwell L.J. in *Protector Endowment Loan and Annuity Co. v. Grice* (1880) 5 Q. B. D. 592, at p. 596: 'But when it forms part of the original intention, that upon default a sum otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty.' But was the original debt here 'payable at a future period'?

A. Q. M.

CONTRACT—MISTAKE AS TO EXISTENCE OF AGREEMENT HELD TO BE MISTAKE OF FACT, NOT OF LAW—COMPANY HELD ENTITLED TO RELY ON MISTAKE BY ONE AGENT AS TO FACTS KNOWN TO ANOTHER AGENT—STATUTE OF LIMITATIONS HELD TO RUN FROM TIME OF MISTAKEN PAYMENT.

Anglo-Scottish Sugar Beet Corporation, Ltd. v. Spalding Urban District Council. [1937] 2 K. B. 607.

PLAINTIFFS had their head office at G., a district office at N., and a branch factory at S. They contracted with defendants for the supply of water to this factory. The original agreement, made in 1925, was for a minimum quarterly payment of £375; by a new agreement of 1927 this was reduced to £100. By mistake the new agreement, which was negotiated by the managing director at G., was never notified to the managers at N. or S. Also by mistake defendants continued to send out demands based on the old minimum rate. These demands were passed for payment by the manager at S. and sent to the manager at N., who

drew cheques, which were signed as a matter of routine by the managing director on his next visit. The mistake was discovered in 1936, and plaintiffs sought to recover the amounts overpaid.

Atkinson J. gave judgment for the plaintiffs, subject to a deduction on account of the Statute of Limitations. He said that *prima facie* the plaintiffs had a clear case. They relied on *Kelly v. Solari* (1841) 9 M. & W. 54, where it was held that money honestly paid under a mistake of fact could be recovered, even if the person paying failed to use means of knowledge which he possessed. Two points, however, had been raised for the defendants:—

(1) That the plaintiff's mistake was a mistake of law, not of fact (it was agreed that a mistake of law did not entitle a person paying to recover). It was necessary, however, to draw the distinction made by Lord Westbury in *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149, 170, between mistake as to general law and mistake as to a private right. Here the payment was made under mistake as to a private right, and the plaintiffs were not barred from recovering for that reason.

(2) That payments voluntarily made with full knowledge of the facts could not be recovered, and that the plaintiff company made these payments, with full knowledge, the knowledge divided up among its agents being the company's knowledge. This argument was based on the judgment of Romer L.J. in *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.* (1936) 155 L. T. 190, at p. 195, where he said that when the defendant company's agent, A, knew a certain representation to be fraudulent, it was immaterial that he did not know that that representation was being innocently made by another agent, B, to the plaintiffs. It was argued that if this principle applied to fraud, *a fortiori* it applied to mistake also. His Lordship held, however, that with reference to the facts of that case Romer L.J. could not be construed as having laid down such a broad principle as that a company was liable for fraudulent misrepresentation whenever one of its agents, though unconnected with the transaction involved, knew the true facts; for in that case A had dishonestly made the representation to B in the first place, whether he knew that B meant to pass it on or not. All that that case decided was, that a principal was liable where fraudulent information supplied by one agent was passed on by an innocent agent.

His Lordship therefore allowed the claim, but held that the Statute of Limitations ran in respect of each payment from the time when it was made, not from the time when the mistake was discovered, and made deductions accordingly from the sum recoverable.

The case was a simple application of *Kelly v. Solari*, but its value seems to lie in the discussion of *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.*, in which his Lordship rejected the dangerous interpretation put by the defence on the judgment of Romer L.J. in that case, and laid down the true principle that if a company is to be liable for fraud one of its agents must have acted in bad faith.

H. A. H.

CONTRACT—PUBLIC POLICY—AGREEMENT NOT TO DISCLOSE A FRAUD
COMMITTED AGAINST ONE OF THE PARTIES—HINDERING PROSECUTION
OF CRIME.

Howard v. Odhams Press, Ltd. [1938] 1 K. B. 1.

H. was a workman in the printing trade and also a member of the trade union of that trade. The defendants were printers and publishers of a newspaper which used to offer money prizes for crossword puzzle competitions. The defendants had cause to suspect that cheating was going on in the competition department among the sorters, of which H. was one. H. was approached and volunteered a typed statement, concerning both a past fraud and others in contemplation, on condition that such statement was not to be communicated to his trade union. The promise of secrecy was given, but later the defendants, having become dissatisfied with H.'s conduct, communicated his signed statement to the trade union. The union thereupon expelled H., who thereby lost not only his employment but also his unemployment pay.

H. sued the defendants for breach of contract. In the Court of first instance Porter J. held that the contract was not necessarily contrary to public policy, but that the decisive cause of H.'s damage was his own wrongful act and not the defendants' breach of contract. He therefore awarded the plaintiff nominal damages. H. appealed, claiming substantial damages. The defendants cross-appealed, contending that judgment should have been given in their favour.

In the Court of Appeal the appeal was dismissed and the cross-appeal allowed. Dealing with the latter first, Slesser L.J. (at p. 29) quoted Warrington L.J. in *Weld-Blundell v. Stephens* [1919] 1 K. B. at p. 533: 'If the document in question revealed a contemplated crime, the commission of which its disclosure might prevent, I think there would be a duty owing to the public which would override any private obligation.' Even if this contract did not purport to withdraw a prosecution from the ordinary course of justice, it at any rate had the effect of restricting the opportunity which the defendants might otherwise have possessed of assisting the authorities in their investigation of the crime.

Greene L.J. considered the motives of the parties to the agreement to be irrelevant. The crucial question, in his opinion, was 'will [the agreement], if carried out according to its terms, operate to the public detriment?'

The statement in question was not merely one of past and possible future frauds, but it also contained information of a contemplated fraud and the proposed method of perpetrating it. Also the future fraud was likely to affect another newspaper. The defendants were concentrating only on defending themselves and had purported to preclude themselves from warning the other newspaper. Such an agreement was contrary to public policy and therefore void.

The main appeal, that damages should be substantial, was decided incidentally by the unanimous decision of the Court to allow the cross-appeal. But Slesser and Greene L.JJ. both dealt with the matter and upheld the decision of Porter J. From the moment that H. did the wrongful act he was liable to expulsion by the trade union. The effect of the defendants' act was merely to prevent him from escaping the consequence of his own wrongdoing, which was the '*causa causans*' of

the injury. The act of the defendants was at the most the '*causa sine qua non*'.

The question which was left undecided by the House of Lords in *Weld-Blundell v. Stephens* was 'how far, if at all, can A recover damages from B for breach of an agreement between A and B to keep secret some wrongful act of A?' On the judgment of Scrutton L.J. in that case the test seems to be, 'does the public policy of enforcing an agreement for which consideration has been given outweigh the public policy of exposing wrongful acts?' If so, the plaintiff can recover damages. In the present case the answer was 'no' because the agreement was such as might fetter the investigation of a crime and it also tended to affect the rights of a third party. As the law stands to-day it would seem that each case must be decided on its own merits.

J. C.

CONTRACT—PUBLIC POLICY—LIFE INSURANCE—SUICIDE WHILE OF SOUND MIND—FELONY—PUBLIC POLICY—ADMINISTRATRIX NOT ENTITLED TO RECOVER POLICY MONEYS.

Beresford v. Royal Insurance Co. [1937] 2 K. B. 197.

THIS was an appeal from a decision of Swift J. to the Court of Appeal. Major Charles Rowlandson, uncle of the plaintiff, who was administratrix of his estate, insured his life in 1925 for an ultimate total of £50,000. He shot himself in a taxicab at two or three minutes before 3 p.m., August 3, 1934, knowing that, as he could not pay the premium due at that hour, the policies on his life would automatically expire unless his life came to an abrupt conclusion. The deceased was of sound mind when he committed suicide and was therefore a *felo de se*. Swift J. gave judgment for the plaintiff. He held that whatever considerations might be urged against enforcing payment of the policy moneys when the assured committed felonious suicide, yet where such an act was not contemplated at the time of effecting the contract, and where felonious suicide was not expressly exempted but impliedly covered, the dominant public policy to be observed was that of the sanctity of contracts.

The Court of Appeal reversed Swift J. and gave judgment for the defendants. Lord Wright M.R. read the judgment of the Court. He said that however absolute the terms of the policy might be, such a contract would not be enforced if it was illegal or against public policy, or if it was otherwise such an agreement as the Court in its inherent jurisdiction would refuse to enforce. The question before the Court was whether the felonious suicide of the assured was a bar to the present action. It could be inferred from *Felstead v. R.* [1914] A. C. 534 that if the deceased had committed suicide while insane his representatives could nevertheless recover the policy moneys on a life insurance. But as yet there had been no decision on a case of felonious suicide. Suicide by a sane person is a felony.

In the present case the assured committed a murder on himself, as it were, so the present claim was technically equivalent to a claim brought by a murderer or his representative on a policy effected by the murderer on the life of the murdered man. In such a case the murderer or his assigns

can take no benefit under the policy: *Cleaver v. Mutual Reserve Fund Life Assurance* [1892] 1 Q. B. 147.

Fry L.J. stated the general principle in *Cleaver's Case* (at p. 156): 'It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.'

Lord Wright referred to *Ritter v. Mutual Life Insurance Co.* (1898) 169 U. S. 139, where it was held that, besides being contrary to public policy, it was against the nature and object of insurance to enforce a liability to pay, when the assured precipitates such a liability by committing felonious suicide.

In the judgment, Lord Wright said (at p. 219) 'that the Court must, we think, apply the general principle that it will not allow a criminal to reap by the judgment of this Court the fruits of his crime'.

In allowing the appeal, the Court stated that its duty to refuse its aid in enforcing contracts, which were illegal or against public policy, excluded its duty to enforce them as otherwise valid.

L. H. M.

CONTRACT—PUBLIC POLICY—PROMISE BY MARRIED MAN, AGAINST WHOM
DECREE NISI OBTAINED BY WIFE, TO MARRY THIRD PARTY—HELD:
PROMISE NOT CONTRARY TO PUBLIC POLICY.

Fender v. St. John-Mildmay. [1938] A. C. 1.

THE wife of the defendant obtained a decree *nisi* for divorce against him. Before the decree was made absolute, he promised to marry the plaintiff after that event. He subsequently refused to carry out this promise. The plaintiff sued him for the breach of it. Verdict £2,000 damages. Hawke J., however, entered judgment for the defendant and a majority of the Court of Appeal affirmed his decision.

The House of Lords, by a majority of three to two, reversed the decision of the Court of Appeal and the defendant was therefore held liable.

Lord Atkin, Lord Wright and Lord Thankerton severally held that after the decree *nisi* had been pronounced the bottom had dropped out of the marriage and that only a shell was left, and they emphasized the principle that there is a paramount public policy that contracts should be observed. Lord Thankerton stated in general that it was the duty of judges to expound, and not to expand the law; and in allowing this appeal he further pointed out that the main fabric upon which any workable set of principles of public policy must of necessity be woven is the contractual freedom of the individual.

Lord Wright in allowing this appeal emphasized the fact that in his opinion *Wilson v. Carnley* [1908] 1 K. B. 729 was not in point, for in that case as in *Spiers v. Hunt* [1908] 1 K. B. 720, where the promise was given while marriage in the full legal sense continued and before any divorce had even been sought, the period of delay between the promise to marry a third party and its fulfilment was of an uncertain duration, whereas in the present case the period of delay was fixed by law. And in any case he was at a loss to see how a question of public policy could be decided upon what appeared to be a technicality.

Lord Russell of Killowen and Lord Roche dissented. Lord Russell of

Killowen feared the wide incidence of this decision which would affect alike the innocent petitioner and the guilty respondent who might now make such a promise to marry. In his opinion there was no question of inventing a new rule of public policy, for the present case was only an illustration of an old rule applied to new facts. In the cases which had hitherto arisen in this country the existing marriage was to have been determined by death; in this case by divorce. And the reasons or some of them which invalidated the contract in *Wilson v. Carnley* applied equally in the present case.

Lord Roche stated that *Wilson v. Carnley*, approving *Spiers v. Hunt*, laid down a settled rule of law that in general promises of marriage made where one party to the knowledge of the other party is married at the time of the promise fall into and constitute a class of contract which is enforceable as contrary to public policy.

An interesting definition of public policy at Common Law appears in 42 *Harvard Law Review* (1928), at p. 92, as 'a principle of judicial legislation or interpretation founded on the current needs of the community'. Public policy as a conception translated into law by the Judiciary must inevitably have two aspects, the positive and the negative aspect; and if the case of *Fender v. St. John-Mildmay* be looked at from a purely positive aspect it will be appreciated that this decision of the House of Lords adds but little to our law. But if one looks at the case in a negative light, as it is submitted one is entitled to do, it can readily be seen that the decision adds appreciably to the law. In so doing one argues that, as it was held by the majority that to enforce such a contract would not be contrary to public policy, one can quite legitimately come to the conclusion that such a contract is now within the pale of public policy.

The Matrimonial Causes Act, 1937, was in effect a direct statutory reflection of the current needs of the community; and this situation furnishes one with a striking example of the way in which both the Legislature and the Judiciary can combine, each in their own sphere, to serve the needs of the nation.

Under section 9 of the Matrimonial Causes Act, 1937, a respondent against whom a decree *nisi* has been pronounced is given the possibility of applying for a decree absolute, whereas under the old law if that respondent wished to re-marry he or she was at the mercy of the petitioner. The combined effect of *Fender v. St. John-Mildmay* and the Matrimonial Causes Act, 1937, and in particular section 9, is to place the rights of unhappily married people who are seeking a divorce on a footing more suited to the needs of a modern community.

A. R. C.

CONTRACT — SALE OF GOODS — WRITTEN CONTRACT — ORAL AGREEMENT
EXTENDING AND POSTPONING PERIOD OF DELIVERY — HELD: THE
VARIATION WAS A MERE VOLUNTARY FORBEARANCE AND NOT A NEW
CONTRACT.

Besseler Waechter, Glover & Co. v. South Derwent Coal Co., Ltd.
[1938] 1 K. B. 408.

THE defendants undertook by written contract to supply 70,000 tons of coal to the plaintiffs in instalments over the period April to December

1936. Before any instalments were due the parties orally agreed, for their mutual convenience, that deliveries should not commence until completion of deliveries under an earlier contract and, thus, should continue after December. In December, however, the defendants intimated that they would not make further deliveries. They contended that the oral agreement was unenforceable, being a parol variation of a contract required by section 4 of the Sale of Goods Act, 1893, to be evidenced in writing.

The plaintiffs claimed damages for non-delivery. The dispute being referred to arbitration, the Umpire decided, subject to the opinion of the Court on a special case, in favour of the sellers.

Goddard J. held that the statute was not an answer to the buyers' claim as the oral agreement was a mere forbearance by the parties for their mutual convenience and thus did not alter the terms of the written contract.

Counsel for the plaintiffs relied on a passage in the dissenting judgment of Martin B. in *Tyers v. Rosedale, etc. Co.* (1873) L. R. 8 Ex. at p. 319, subsequently upheld (L. R. 10 Ex. 195): 'It (*i.e.* the variation) was not a contract for the sale of goods . . . but a contract respecting the delivery of goods already sold, which is not within the section at all.' Alternatively they urged that deliveries made under the oral agreement constituted sufficient part performance to satisfy the statute. For the defendants it was contended that the parol agreement was a variation, being an agreement affecting the written contract in an essential part, and not merely a change in the method of performance. The arbitrator had found that time was of the essence of the contract.

In his judgment, Goddard J., dealing with the reliance of plaintiffs' counsel on the words of Martin B., above, said (at pp. 415-6): 'I feel a difficulty in holding that the approval which the Exchequer Chamber gave to the judgment of Martin B. necessarily extended to this part of his judgment . . . it seems to me that a term as to delivery is a term of the sale and if that term be altered it is an alteration of the terms of the contract of sale.' The learned judge then pointed out the difficulty of reconciling past cases, continuing (at p. 416): 'I think it is possible to extract a principle—and it seems to me to be this: If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing; so, too, if as a matter of contract the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected and the obligation to deliver and to accept the full quantity still continues.'

Regarding the plaintiffs' contention that there was sufficient part performance, Goddard J. pointed out that *Morris v. Baron & Co.* [1918] A. C. 1 had decided that there is a real distinction between varying an existing contract and rescinding a contract and substituting for it a new agreement. The facts did not show any intention by the parties, in making the oral agreement, to rescind the written contract.

The law thus seems to be that a mere forbearance concerning delivery, not amounting to a variation, does not come within the Sale of Goods Act (section 4), and the original contract remains enforceable.

R. B.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF EVIDENCE WHICH NOT MERELY IMPUGNED THE CREDIT OF CROWN WITNESSES BUT ALSO FORMED THE PITH OF PRISONER'S DEFENCE.

R. v. Phillips. (1936) 26 Cr. App. R. 17.

P. was convicted of incest with his daughter B. He appealed on the grounds of wrongful exclusion of evidence which tended to establish the foundation of his defence—that the charge was a fabrication and that B. and her sister I., the chief witnesses for the prosecution, were the mouth-piece of their mother, with whom P. was on bad terms. The judge had thought that a suggestion which P.'s counsel put to B. and I. during cross-examination, and which the latter both denied, was directed against their credibility. This suggestion was that on two occasions B. and I. had admitted that, at their mother's instigation, they had given false evidence against P. twelve months previously, when P. had been summarily convicted of indecently assaulting B. The judge had therefore declined to admit evidence which P.'s counsel sought to produce for the purpose of contradicting B. and I. and which appeared, on the face of it, irrelevant to the issue.

The Court of Criminal Appeal quashed the conviction.

The Court said that 'the matter having been faintly adumbrated and the point not having been fully argued', evidence was excluded by the judge as being irrelevant because he mistakenly believed that the *sole* purpose of the suggestion was to test the credit of B. and I. But, in fact, the *real* purpose of the suggestion was to raise the defence of a plot of long standing on the mother's part; it was a defence which the appellant had been entitled to raise and the excluded evidence was of the very gist of it. Had this defence been raised, there might have been at least three possibilities: (1) the evidence excluded might not have impressed the jury; (2) even if it had, the jury might not have necessarily disbelieved B. and I.; on the other hand (3) the jury might have considered the charge a fabrication.

The contention of the counsel for the Crown, that no substantial miscarriage of justice had occurred, extended only to the first one, or possibly two, of the above possibilities and not to the third. It was 'impossible to say that, if the evidence excluded had been allowed to be heard, the jury must certainly or would inevitably have arrived at the same verdict'. The appeal was therefore upheld.

See also *Att.-Gen. v. Hitchcock* (1847) 1 Exch. 91 (Pollock C.B.); *R. v. M'Gavaran* (1852) 6 Cox 64 (Williams J.); and *R. v. Cargill* [1913] 2 K. B. 271.

B. J.

CRIMINAL LAW—MANSLAUGHTER—DEATH CAUSED THROUGH DANGEROUS DRIVING OF MOTOR CAR—DEGREE OF NEGLIGENCE NOT NECESSARILY THE SAME AS THAT FOR DANGEROUS DRIVING UNDER ROAD TRAFFIC ACTS.

Andrews v. Director of Public Prosecutions. [1937] A. C. 576.

THE chief point in this case as it was submitted to the House of Lords, is whether it is necessarily manslaughter if it has been proved

that the accused has caused death while driving in a manner dangerous to the public within the meaning of section 11 of the Road Traffic Act, 1930.

Andrews was indicted for manslaughter through dangerous driving. The established facts were that Andrews, while driving at a speed of thirty miles per hour on a well-lighted road on which there were a number of people, overtook another car and, in attempting to pass it, ran over and killed a pedestrian. He was convicted. The C. C. A. affirmed the conviction. So did the House of Lords, as they regarded the direction of the learned judge as correct upon the whole. It was urged that the judge had misdirected the jury, first when he told them that it was their duty to convict the appellant of manslaughter if they found that he had caused death while driving a motor car recklessly within the meaning of section 11 of the Road Traffic Act, 1930, and secondly, when he failed to point out to them that they could not find the appellant guilty of manslaughter unless he had been proved to have caused death by reason of a particularly high degree of negligence.

Lord Atkin laid special emphasis on the high degree of negligence required to support a conviction of manslaughter. Dangerous driving, he said, involves such a degree of negligence that it will almost certainly be manslaughter if death is caused. But this does not mean that the degree of negligence in dangerous driving is the same as that in manslaughter. It would be a misdirection to the jury if in a manslaughter case the judge told the jury to consider no more than whether death was caused through dangerous driving within the meaning of the Road Traffic Act, 1930, s. 11. In the law of manslaughter a distinction has to be drawn 'between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal' (at p. 585).

Their Lordships have made it quite clear in this case that death caused in the course of an unlawful act, not amounting to a felony, is not necessarily manslaughter. Nevertheless, it seems singularly unfortunate that, except for a few references to it, one important aspect of the case should have been almost entirely ignored by their Lordships. This is the question of the degree of negligence in manslaughter which arises as a subsidiary question in this case. It is respectfully suggested that in not dealing more fully with, and in not attempting to define, the negligence required in manslaughter the House of Lords lost a valuable opportunity for clarifying one of the major difficulties of the law of manslaughter.

On this problem, see the illuminating articles by Mr. J. W. C. Turner in 5 *Camb. Law Journal*, 61—76; 6 C. L. J. 31—66; and Mr. Patrick Dean in 53 L. Q. R. 380-87.

C. N. L.

CRIMINAL LAW—MURDER—KILLING DURING ATTEMPT TO COMMIT RAPE
—HELD TO BE MURDER.

R. v. Stone. (1937) 53 T. L. R. 1046.

IN this case Stone appealed against his conviction for the murder of Miss Keen whom he had strangled while attempting to ravish her. At the trial, the jury asked, 'If as a result of an intent to commit rape a

girl is killed, although there was no intention to kill her, is the man guilty of murder?' 'Undoubtedly', said Lord Hewart C.J.; and the jury accordingly convicted. On appeal, counsel for Stone argued that he had not effected an act of rape; apart from the death he could only be indicted for attempted rape, or assault with intent to commit rape; therefore his case was not covered by *D. P. P. v. Beard* [1920] A. C. 479, as the death did not result from an act committed in furtherance of a felony of violence. Secondly, he argued that in *R. v. Whitmarsh* (1898) 62 J. P. 711 and *R. v. Lumley* (1912) 22 Cox C. C. 635, where death had resulted from abortion, the Court had required that the death should not merely result from an act committed in the furtherance of a felony, but that that act must be one which in the contemplation of a reasonable man must be capable at least of causing grievous bodily harm; and an analogy should be drawn from these cases in the present case.

The Court upheld the conviction. They rejected the second argument as a false analogy; and, as regards the first, they held that the answer of Lord Hewart C.J. to the jury was correct. In effect, they held that where death occurs as the result of an act committed in the furtherance of a violent felony, this is murder, irrespective of whether the felony is completed or not.

This decision gives a wide interpretation to this form of malice aforethought. It was held that an act may be done in furtherance of a violent felony (and so give rise to constructive malice aforethought) though that felony is never completed; and, as has been pointed out by a recent writer (54 L. Q. R. 22—24), an act may be committed in furtherance of a felony even before the 'attempt' stage has been reached. It is clear, therefore, from *Stone's Case* that death resulting from an act committed in furtherance of a violent felony before or after the 'attempt' stage has been reached, and even if the intended felony is never completed, is murder. It is not clear what the position is where death results from an *accidental* act of the wrongdoer committed before the 'attempt' stage has been reached, but when he is already 'on the job'; e.g. A, in boarding a train to travel to a place where he intends to commit a violent felony, accidentally knocks B down so that B cracks his skull on the platform and dies. It would be difficult to construe the act of knocking down, from which death results, as an act in furtherance of the felony.

For this type of constructive malice the felony must be one of violence; but neither in *Beard's Case* nor in *Stone's Case* did the Court attempt to define a felony of violence; and it is still not clear whether it is one intrinsically violent or one violent in the manner of commission. There was no need to define it in these cases, since the felonies there were both violent intrinsically and violently committed.

P. G.

TORT—DANGEROUS PREMISES—CHILD INJURED BY BROKEN GLASS IN
PADDLING POOL IN PUBLIC PARK—HELD TO BE A LICENSEE AND
DAMAGES RECOVERABLE AGAINST LOCAL AUTHORITY.

Ellis v. Fulham Borough Council. [1938] 1 K. B. 212.

THE defendants provided a public park for the use of the inhabitants of the district. In this park was constructed a paddling pond filled with

sand for children to paddle in. The defendants affixed a notice to a board near the pool stating that 'owing to the risk of cut feet persons must not take into the paddling pool any bottles, tins, or other sharp materials'. They also provided park-keepers who, under instructions, raked the pool every morning; but the rake used would not go into the sand but only over the surface so that anything embedded in the sand would not be disclosed by the rake. The plaintiff, a little boy who was paddling in the pond, had his foot cut with a piece of glass embedded in the sand. A short time previously another boy had his foot also cut in the same pond to the knowledge of the park-keeper.

Held, by Greaves-Lord J., that the plaintiff was an invitee and that the defendants were liable.

On appeal it was held that, on the assumption that the plaintiff was only a licensee, nevertheless the defendants were still liable.

Greer L.J. (at p. 221) thought that Lord Hailsham L.C. in *Addie v. Dumbreck* [1929] A. C. 358, at p. 364, although he had classified invitees and licensees as distinct, had made a slip in stating that the licensor is liable for dangers which 'ought to be known' to him; for that would be equating the liability of invitees and licensees. Greer L.J. himself laid down the position as regards licensors as follows: 'There is a liability on the licensors to protect licensees from dangers which are known to the corporation, the licensors, and which are not likely to be known to the licensee' (at p. 227). That they knew the danger existed was proved by the precautions they adopted which, however, turned out to be inadequate, and the previous accident to another boy. Therefore they were liable.

Slesser and MacKinnon L.J.J. held that persons who entered a public park provided by a local authority were only licensees and not invitees. Greer L.J. expressly left the question open. They all agreed that in cases of this kind people fall into three categories, and that the intermediate class suggested by Maugham L.J. in *Purkis v. Walthamstow B. C.* (1934) 151 L. T. 30, 34-5, could not be supported. Slesser L.J., the only one to argue the question at length, said that there was not sufficient interest between the parties to make them invitor and invitee. The judge in the Court below held that the interest on the part of the council was the promise they made to provide a pool out of the rates. Slesser L.J., however, said that there was no evidence of such a promise and even if there were it would not constitute a material interest 'because in any event there is not a material but, I suppose, only a spiritual interest in keeping promises' (at p. 229). He thought, further, that rate-payers are in no more privileged position than other people. Again, in his opinion, the weight of authority was against regarding people in public parks as invitees. In *Glasgow Corporation v. Taylor* [1922] 1 A. C. 44 Lord Shaw (at p. 60) and Lord Atkinson (at p. 53) treated the child in the park as being in the position of a licensee not expressly but by implication. Here it may be noted that Greer L.J. said, 'if this question were free from authority I should be inclined to agree with the learned judge that the position was one as between invitor and invitee' (at p. 221).

Both Slesser and MacKinnon L.J.J. were emphatic that the plaintiff was a licensee and it may be assumed that their view will be followed at any rate by any Court below the House of Lords.

H. W. W.

TORT — DEFAMATION — LIBEL — NOT DEFAMATORY TO ACCUSE ANOTHER OF REPORTING CRIMINAL OFFENCE TO POLICE — PUBLICATION ON DEFENDANTS' PROPERTY BY UNAUTHORIZED ACT OF THIRD PERSON — DEFENDANTS HELD LIABLE WHERE NOTICE EASILY REMOVABLE.

Byrne v. Deane. [1937] 1 K. B. 818.

The defendants, husband and wife, were the proprietors of a golf club of which the plaintiff was a member. In the club-house were some automatic gambling machines. As the result of information supplied to them the police removed these machines. Next day a sheet of paper was pinned to the wall of the club-house by some one unknown, containing these lines:—

'But he who gave the game away
May he byrnn in hell and rue the day.'

The plaintiff sued the defendants for libel alleging that the words accused him of disloyalty to the club and that the defendants by failing to remove the notice, when they knew of its existence, had helped to publish it. Hilbery J. held that the words were defamatory and that there had been a publication by the defendants. The decision was reversed on appeal.

Slessor and Greene L.JJ. (Greer L.J. dissenting) held that it was not defamatory to accuse another of giving information to the police; also Slessor L.J. found that there was evidence of publication on the part of the female defendant; Greene L.J. that there was evidence of publication by both; *per* Greer L.J. that the notice was defamatory of the plaintiff and had been published by both defendants.

Slessor L.J. (at p. 853) approved Lawson J. in the Irish case of *Mave v. Pigott* (1869) Ir. R. 4 C. L. 54, 62 who said: 'The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men'; the learned L.J. took as a test the view that would be taken by the 'ordinary good and worthy subject of the King' and came to the conclusion that in this view it would be a man's duty to report such a case to the police. With all due respect it is difficult to believe that, in trivial cases involving no moral blame, the average 'subject' would see his duty in this light. But on the other hand, as was pointed out by Greene L.J., it is no easy matter to draw a distinction between one crime and another, and otherwise that is what the Court would have to do.

Greene L.J. raised a difficult problem where a third party imposes defamatory matter on the premises of the defendant: he gave as the test (at p. 838): 'Having regard to all the facts of the case, is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?' The learned L.J. instanced two cases, one on each side of the line: where a person carved something defamatory on the stonework of another's house so deep that only by replacing the stone could it be removed; and where, as in this case, a mere notice was pinned on the wall. In the last case of course there could be no excuse for leaving the notice up. It would certainly be very hard on the owner of premises to force him to go to the expense of pulling down part of his wall, but it has been argued (83 Law

Journal 264) that as the loss must fall on one of two innocent parties, the householder should suffer to avoid an otherwise permanent imputation on a man's character.

A. H. N.

TORT—INTERFERENCE WITH TRADE—LEGALITY OF DEMAND FOR MONEY AS ALTERNATIVE TO PUTTING A TRADER ON STOP LIST—DEMANDING MONEY WITH MENACES—DEMAND HELD TO BE MADE WITH REASONABLE AND PROBABLE CAUSE.

Thorne v. Motor Trade Association. [1937] A. C. 797.

THE Motor Trade Association (M.T.A.), in pursuance of its trade policy, periodically published a stop list containing the names of persons with whom its members were forbidden to trade. By a rule of the M.T.A. its council was given the power of placing the name of any person who infringed its regulations upon the stop list, or of giving him the alternative of paying a limited sum of money to the M.T.A. as a fine. T., a member of the M.T.A., brought this action for a declaration that such a power was illegal or *ultra vires* and for an injunction to restrain the council from acting under it. T. based his contention on the ground that the person who writes on behalf of the Association to demand a fine necessarily commits the offence of uttering a letter demanding money with menaces, and without reasonable or probable cause, under section 29 (1) of the Larceny Act, 1916. There was no doubt that it was perfectly lawful to place a person's name upon a stop list: *Ware and De Freville v. Motor Trade Association* [1921] 3 K. B. 40, approved in *Sorrell v. Smith* [1925] A. C. 700.

The case was taken to the House of Lords where it was held that the writer of such a letter did not necessarily commit the above offence, for, although all the other elements were present, there might nevertheless be reasonable and probable cause for the demand. In the words of Lord Atkin (at p. 807): 'It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in the furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts.' Their Lordships were unanimous, but Lords Wright and Roche added (at pp. 818, 824) that they thought 'reasonable' should apply to the amount demanded as well as to the cause for demanding it. Lord Wright pointed out (at p. 817) that it seemed impossible to give any meaning to the word 'probable' in the Act beyond that which was expressed in 'reasonable'.

The importance of the case lies in that it has given a definite ruling on a point upon which there was previously a conflict of judicial opinion; indeed it was a friendly action brought for that very purpose; and one, at least, of their Lordships felt some doubt whether it was one in which a declaration ought to have been granted. In *R. v. Denyer* [1926] 2 K. B. 258, under circumstances exactly similar to those in the present case, the Court of Criminal Appeal upheld a conviction under section 29 (1) of the Larceny Act of the secretary of the Association who had written to a person who had infringed one of its rules demanding money as an

alternative to the publication of his name on the stop list. In *Hardie and Lane v. Chilton* [1928] 2 K. B. 306, another similar case, the Court of Appeal held that there was a reasonable and probable cause, and Scrutton L.J. said (at p. 319): 'The most obvious reasonable and probable cause appears to me to be where you have a legal right to do the thing you threaten to do.' In *Thorne v. Motor Trade Association* it was held that *Hardie and Lane v. Chilton* was correctly decided, although the principle stated by Scrutton L.J. was too wide (see Lord Wright at pp. 822-3); *R. v. Denyer* was disapproved. It is interesting to note that this decision is in accordance with the conclusions reached by Professor Goodhart in *Essays in Jurisprudence and the Common Law*, 175-189.

G. L. E.

TORT—MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE SYSTEM OF WORKING IN MINE—DELEGATION BY MASTER TO SERVANT—LIABILITY OF MASTER—COMMON EMPLOYMENT NO DEFENCE.

Wilsons & Clyde Coal Co., Ltd. v. English. [1938] A. C. 57.

APPEAL to the House of Lords from the Scottish Court of Session. English, the respondent, who was employed in one of the appellants' mines, was returning to the pit bottom along one of the main haulage roads at the end of the day shift when he was injured by the haulage plant being set in motion.

English's case was that it was a necessary part of a safe system of working that the haulage should be stopped during the period fixed for raising the day shift men up the pit. The appellants stated there was an alternative road open for the respondent's return to the pit bottom, and that, in any event, he should have informed the man in charge of the haulage plant of his emergence into the main haulage road. They pleaded contributory negligence.

At the trial certain questions were left to the jury, who found (1) that on the occasion of the accident there was not provided in the colliery a reasonably safe system of working, (2) that the accident was due to the failure to provide a reasonably safe system of working, and (3) that the defect in the system was known to the agent employed by the directors of the appellant company, but not to them personally. Upon these findings judgment was entered for English and on appeal the Court of Session refused to disturb this judgment. The House of Lords affirmed their decision.

It was argued for the appellants that a master could not be said to have undertaken to do something which he had deliberately delegated to the agent and which, indeed, he was bound by statute to delegate if he had not the requisite qualifications himself; that it was the delegate who had been negligent and therefore under the doctrine of common employment the master was not liable. But the House held that the provision of a safe system of working in a mine is an obligation of the owner, who, if he appoints an agent to perform it, remains vicariously responsible for the agent's negligence.

Lord Thankerton examined the scope of the doctrine of common employment, illustrating his argument with the cases of *Bartonshill Coal Co. v.*

Reid (1858) 3 Macq. 266, where the doctrine clearly did apply since the injury was due entirely to the negligence of a fellow-workman, and *Sword v. Cameron* (1839) 1 D. 493, where it equally clearly did not since the injury was the result of a defective system of working in a quarry. He discussed at some length *Wilson v. Merry and Cunningham* (1868) L. R. 1 H. L. (Sc.) 326, in which the workman failed to succeed because it was held that the actual defect in the ventilation of the pit was not a defect in the system of ventilation for which the employers were liable, but one caused by a temporary structure, erected under the direction of the pit manager, who was a fellow-workman within the rule of common employment. In conclusion he referred to *Fanton v. Denville* [1932] 2 K. B. 309, which was later treated in greater detail by Lord Wright (at p. 77). The latter criticized certain statements made by the Court of Appeal in their judgments, and suggested that their decision had been inferentially overruled by the House of Lords in *Lochgelly Iron and Coal Co. v. McMullan* [1934] A. C. 1. The obligation upon an employer is threefold, 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision'. The Court of Appeal had attempted to reduce the three heads of duty to one only, *i.e.* to engage competent employees of the higher grades and to leave everything else to them, thus escaping all further responsibility.

The doctrine of common employment is certainly not one to be extended and the duty to provide a reasonably safe system of working lies within the personal province of the employer.

P. S. P.

TORT — NEGLIGENCE — CLAIM BY ADMINISTRATOR OF DECEASED UNDER LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, FOR PAIN AND SUFFERING, LOSS OF LEG, AND LOSS OF EXPECTATION OF LIFE HELD TO BE MAINTAINABLE.

Rose v. Ford. [1937] A. C. 826.

Miss R., a young woman, sustained serious injuries to her leg in an accident, due to the negligence of F. The leg was amputated, gangrene set in and she died through her injuries four days after the accident, having been unconscious most of that time.

Her father brought an action against F. under the Fatal Accidents Act, 1846, for her dependants, and under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming for her estate damages (a) for pain and suffering, (b) loss of her leg, (c) loss of expectation of life.

Humphreys J. awarded the plaintiff damages for pain and suffering, and the loss of her leg, the former only nominal, being limited to the four days after the accident; no damages were awarded for loss of expectation of life.

The Court of Appeal, upholding the decision of Humphreys J. as to pain and suffering, held that damages for the loss of the deceased's leg must also be nominal as she survived the amputation for two days only, and that no damages were recoverable for loss of expectation of life. On this last point Greer L.J. dissented, fixing the damages at £1,000.

On appeal to the House of Lords, it was held, affirming the dissenting

judgment of Greer L.J., that under the Act of 1934 the plaintiff, as administrator of the deceased's estate, was entitled to recover damages for her loss of expectation of life, the sum to be £1,000 as fixed by Greer L.J.

The House considered first *Flint v. Lovell* [1935] 1 K. B. 354. They held that the decision was correct but not limited, as had been decided in the Court of Appeal, to claims made before the death of the injured person. Lord Wright mentioned several *obiter dicta* to show that to take this element of damage into calculation was not novel, and agreed with the other judges that the appellant had a good cause of action for loss of expectation of life (at p. 845): 'The moment before the girl died there was, as I think, apart from her actual death a cause of action vested in her for deprivation or loss of expectation of life. Before the Act, that cause of action would have ceased with her death. That same cause of action, by force of the Act, now survives in the administrator.'

The Court also discussed *Baker v. Bolton* (1808) 1 Camp. 493 and *Admiralty Commissioners v. S.S. Amerika* [1917] A. C. 38. They were distinguished on the ground that in them a living person was suing another living person for damages caused by the death of a third person, whereas here the action was that of the deceased, vested in the appellant as her administrator, under the Act of 1934.

The Court finally considered duplication of damages awarded under this Act and the Fatal Accidents Act. Lord Atkin and Lord Wright both stated that there should be no duplication of damages under these Acts. In the later case of *Feay v. Barnwell* [1938] 1 All E. R. 31 this principle was in fact applied.

Rose v. Ford has opened up a new field of damages by extending the rule in *Flint v. Lovell*. There is admittedly considerable difficulty in assessing damages for loss of expectation of life. Further, it seems to be an unnatural extension of legal principles to award such damages when the person injured has died and can no longer appreciate life.

K. R. F.

TORT — NEGLIGENCE — PEDESTRIAN INJURED AT BELISHA CROSSING BY MOTORIST'S BREACH OF STATUTORY REGULATIONS—HELD: CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN NO DEFENCE.

Bailey v. Geddes. [1938] 1 K. B. 156.

THE plaintiff was knocked down by the defendant's car in Holloway Road, down the centre of which ran two lines of tramlines. He was crossing the road by means of a pedestrian-crossing marked by Belisha beacons. When he got to the centre of the road, a tramcar approached him on the second set of tramlines and then pulled up again when about five yards away from the crossing. The plaintiff continued on his way and had nearly reached the opposite kerb when he was knocked down by the defendant's motor car, which was going in the same direction as the tramcar. He might have seen the defendant's car if he had looked and he could then have avoided the accident.

Greaves-Lord J. gave judgment for the defendant, on the ground that the plaintiff was guilty of contributory negligence in that he chose to go

on in spite of the risk that the driver of the motor car might be unable to stop.

The Court of Appeal unanimously reversed his decision. No. 3 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, which have the same statutory force as if they were contained in the Road Traffic Act, provides that 'the driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing'. No. 4 imposes an obligation upon the driver of any vehicle to give precedence to a foot passenger on the crossing, provided traffic is not being controlled by a police constable or traffic lights. By a crossing is meant a pedestrian crossing marked by Belisha beacons.

Slessor L.J. said that unless the driver could see that there was no pedestrian on the crossing, then he came under an obligation to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. The defendant was unable to see that there was no pedestrian on the crossing because of the tramcar, thus it became his absolute statutory duty to be able to stop before reaching the crossing.

For the defendant, the rule laid down in *Flower v. Ebbw Vale Steel, Iron and Coal Co.* [1936] A. C. 206 was pressed, namely that contributory negligence on the part of the plaintiff was a valid defence to an action founded on breach of a statutory duty by the defendant. Slessor L.J. considered that the question of contributory negligence did not arise in this case, as it was physically impossible that the cause of the accident could be the negligence of the plaintiff because, *ex hypothesi*, the defendant, if he had done his duty, would have already stopped. Further, Greer L.J. pointed out that it was not contributory negligence on the part of the plaintiff not to look, as he was entitled to suppose that vehicles approaching the crossing would strictly obey the regulations.

There can be no doubt that the law as interpreted in this case places a severe burden on the motorist, and it has been concluded that motorists will be held liable if a pedestrian suddenly dashes on to the crossing without any warning. But it is submitted that in such a case the motorist would not be liable as he would not be able to see that there was a pedestrian on the crossing; and indeed Slessor L.J. admitted that 'contributory negligence may apply in appropriate cases' (p. 166).

But nothing can alter his liability if he can see that there is some one on the crossing or if he is unable to see that there is no one on the crossing on account of other vehicles in his line of vision.

D. M. K. G.

WILL—EXERCISE OF SPECIAL POWER OF APPOINTMENT—INCOME FOR LIFE TO TWO GRANDCHILDREN IN EQUAL SHARES AS TENANTS IN COMMON — WHOLE INCOME TO SURVIVOR DURING RESIDUE OF LIFE — REVERSIONARY INTEREST OF SURVIVOR HELD TO BE CONTINGENT AND TO BE VOID AS CONFLICTING WITH RULE AGAINST PERPETUITIES.

Re Legh's Settlement Trusts; Public Trustee v. Legh. [1938] 1 Ch. 39.

A TESTATOR exercised by his will a special power of appointment conferred on him by a deed of arrangement and resettlement dated October 2, 1891. He appointed a sixth part of the settled funds in

favour of two grandchildren upon trust during their joint lives to pay the income thereof to them in equal shares as tenants in common, and after the death of either of them to pay the whole of the income thereof to the survivor of them during the residue of his or her life.

Neither grandchild had been born at the date of the instrument which conferred the special power, so that the question which fell to be decided was whether the gift of the whole income to the surviving grandchild was void as a perpetuity. Luxmoore J. declined to answer this question and the case went to the Court of Appeal, which held unanimously that the gift infringed the rule against perpetuities.

The point in issue before the Court was whether on the true construction of the will the reversionary life interest appointed to the survivor was vested or contingent. The Court held that it was contingent. 'The original interest given to the two grandchildren is an interest to them as tenants in common, the duration of their interest as such being the joint lives of the two. Upon the death of the first to die a new and different interest is given—namely, a life interest in the entirety. During the joint lives it is uncertain which of the two will survive to take that interest which is in consequence of necessity contingent in the case of each grandchild' (*per* Sir Wilfrid Greene M.R. at p. 45). As neither of the appointees was alive at the date of the deed which conferred the special power of appointment, this contingent interest would not necessarily vest within a life in being and a period of twenty-one years thereafter and was therefore void for perpetuity.

The Court approved *Whitby v. Von Luedecke* [1906] 1 Ch. 783, where Buckley J., dealing with an appointment in terms substantially the same as those in the present case, held that the gift to the survivor was contingent and therefore void for perpetuity. He said (at p. 788): 'What I have here is a gift under which . . . only the survivor of the two ladies will be entitled to some estate under these words, "in the event of the death of either the survivor shall receive the whole", and I could not at the mother's death have said which of the two it was. It seems to me that that was a contingency—a contingent estate.' Eve J. had followed that decision in *Re Samuda's Settlement Trusts* [1924] 1 Ch. 61, but reluctantly. Moreover, the case had been adversely criticized in Jarman on Wills (7th ed. Vol. 1, p. 324). But neither Eve J.'s reluctance nor the criticism in Jarman commended itself to the learned Lords Justices.

The case illustrates the strict and technical character of the rule against perpetuities. The Court could not have regard to the circumstance that if the survivor's interest were construed as contingent it would attract the perpetuity rule, which thus operated to defeat the testator's intention, although all the members of the Court were agreed that that intention could have been realized by the use of apt, but different, language. 'He could, for instance, have avoided all difficulty by appointing one half of the share to the grandson for life with remainder to the granddaughter for life, and the other half to the granddaughter for life with remainder to the grandson for life' (*per* Romer L.J. at p. 47).

The rule against perpetuities in a case such as this, where the testator's legitimate object, which could have been secured by different words, was disappointed, lacks elegance and justice.

G. W. H. R.

BOOK REVIEWS.

Felony and Misdemeanor, A Study in the History of English Criminal Procedure. By JULIUS GOEBEL, Jr., Professor of Law, Columbia University School of Law. Vol. I. New York: The Commonwealth Fund. London: Humphrey Milford, Oxford University Press. 1937. xxix and 455 pp. (21s.)

THIS eminent work of a distinguished American scholar starts by dissociating itself, with an excess of severity, from the historical traditions of America, where 'the lawyers' ritual of historical investigation . . . has become a matter of mechanical gesture, bereft of all piety, pervaded with pettifoggery' (p. xvii). Indeed, the work is one of the most characteristic products of the German school; not only in its scholarly thoroughness and philological minuteness, its pan-European outlook and wealth of ideas, but also in less commendable features, such as the comparatively slight attention paid to authorities other than German (cf. the Table of Abbreviations); the exuberance of its 1,285 footnotes, some of which cover several pages (e.g. n. 80, pp. 229—232); the lack of transparency in the structure of the work, none of the chapters and subsections of which stand in any evident relation to the two terms forming the title. But the work is at the same time an energetic, deliberate and successful attempt at emancipation from these influences, and this gives it a more general importance than its subject, important as it is, might claim, and certainly a more topical interest. It has long been suspected, especially in France, that in the overwhelming and universal success of German historical science, in Law as well as in every other field, during the nineteenth century there was an unsound and almost uncanny feature. It is this feature which explains the success of that magnetic power and is at the same time a warning against it. It is, as I would put it, the combination of extreme methodical exactness and completeness in the *collecting* and *stating* of facts with a dangerous, though less extreme, fancifulness and arbitrariness in the *interpretation* and *systematization* of these facts. One could probably discover a corresponding feature in other manifestations of the modern German spirit, but in legal history it is quite obvious. Professor Goebel is not concerned with this dual element in the works of the Romanists such as Hugo and Savigny, Huschke and Fitting, and almost the whole host of interpolationists, but he has learned to appreciate to the full as well as to suspect Germanists such as Grimm, Wilda, Sohm, von Amira and Ficker. Experts will not be surprised to find even one of Gierke's views called 'a fabric of pure conjecture' (p. 11, n. 14), but it will come as a shock to most that even Brunner is constantly accused, and usually convicted, of indulging in unreal constructions based chiefly on anachronistic arguments (cf. pp. 54, 65 n. 1, 78, 190 n. 4, 213 n. 52). This is by no means the first revolt against

Brunner's hegemony (though the author would probably be the last to deny that Brunner will maintain his pre-eminent position), and it remains to be seen whether this revolt will share the fate of its predecessors, which were speedily put down by Brunner's pupils. It is, of course, impossible to expound all of Professor Goebel's new results, still less his personal views, on points of penal history, nor should I feel competent to do so; still less do I feel tempted to judge the penetrating linguistic enquiries into the varieties and changes of the meaning of legal terms which occur throughout the book. But a few of the main problems can and must be mentioned. Some of the literal extracts that will be given may at the same time serve as an example of the author's racy, resourceful, and picturesque English which will no doubt delight the American reader.

The first chapter, 'The Foundations of Early Law Enforcement', begins with a surprising but convincing attack on a theory which was founded by Wilda almost a century ago, and after its elaboration by such authorities as von Amira and Brunner has become a dogma: the 'peace-theory', according to which (a) every crime is a breach of the peace; (b) serious misdeeds lead necessarily to outlawry of the offender; and (c) such 'peacelessness' is the essential condition of feud. Professor Goebel holds on the contrary that 'the malefactor is certainly peaceless in the factual sense that he will not be let alone; any legal sense of being without the law, or of having been ejected from a "peace" is not demonstrated. Indeed the little we do know about Germanic customs before the great migrations is itself an implicit denial of any notion of outlawry, either as a necessary process of law, or as an inevitable and automatic result of a criminal act' (p. 15). The author suspects 'that a romantic view of the ancient Teutons as somehow a profoundly law-abiding people' is one of the roots of the peace-theory (p. 17). However that may be, he gives excellent reasons for his position, partly of a technical, partly of a common-sense nature; e.g.: 'The "general peace" as the equivalent of legal order could not have had any great significance when, in the first place, feud could be sustained without flavour of wrong, and when, secondly, even after a judicial proceeding, violence could be resorted to for the same cause of action unless there had been a binding final concord' (p. 37). He shows equally well that the evidence for the peace-theory is flimsy, mostly linguistic, unduly general and often anachronistic; it bears out the author's contention that continental as well as English legal history is still a prey to the fantastic idea of Grimm (and the whole Historical School of Law) that early medieval law is 'something less affected by national influences or even local peculiarities than by a sort of all-pervading undifferentiated Germanic *Volksgeist*' (p. 3). Another remarkable trait of this chapter is the vivid description of the bargain character of the composition procedure (pp. 28 ff.). In the next chapter, on 'Frankish Crown Procedure and the Growth of Public Order', we pass from folklaw to king's law. Here, as elsewhere, the author never studies a rule of law without referring to its procedural function and social implications; he explains state initiative in prosecution as a means of dealing with thieves and professional wrongdoers, since 'folk-law procedure is drawn in terms of known defendants with family connections and upon the assumption that composition will normally be collectible' (p. 64). This idea—not new but better formulated than before—is developed in many of its consequences. Thus, the procedure in cases of 'handhavingness'—the author goes very far in Anglicizing

Germanic terms—is considered a case of the injured person instantly exercising his privilege of feud against the malefactor caught red-handed; Brunner's view that it is a case of the offender having made himself outlaw by his crime is refuted (as it is also by F. Beyerle, who is followed in this chapter on the strength of new arguments) on the convincing ground that the procedure is not open to third parties as might be expected if the peace-theory were true (p. 85). This is only one instance of the author's vigorous attacks on the famous dogma of the 'Abspaltungen der Friedlosigkeit' (offshoots of outlawry) which purports to explain almost the whole Germanic penal system; he combats it not only in the original form given to it by Brunner, but also in its modification by v. Amira, who neglected 'to relate the punishment to the whole procedural structure and to the ends for which this exists' (p. 83). Here again the unhappy consequences of the romantic *Volksgeist* theory are shown to be at work by barring the appreciation of strong Roman and Canonical influences. Particularly interesting is the proof that destruction of a man's home—an institution to be found in so many systems—is again not an offshoot of the Germanic outlawry but derived from property confiscation in late Roman law (pp. 99 ff.).

The two topics of Chapter III, The Dispersal of Jurisdiction and Norman Reception of Frankish Law, are linked together by the obvious consideration 'that when the Normans commenced to settle in and govern their duchy, they received Frankish institutions as they found them and not as they had once existed' (p. 171). What they found was almost complete 'morcellation' of central jurisdiction through the spread of the Frankish immunity. Its phases are traced with the help of the charters of the ninth, tenth and eleventh centuries, an original piece of research which happily supplements and corrects the somewhat vague descriptions of 'le régime seigneurial', 'la société féodale' as current in the numerous French text-books (p. 125, n. 1; but the author does not seem to have used the one which I have found to be the most satisfactory, that of J. Brissaud, 1904). The approach is again sociological. For him the 'Frankish Empire' is no longer, as the German school sees it, 'a going concern—the momentum acquired in earlier decades unchecked, the institutions marching on to the fate inherent in the logic of their original purpose' (p. 124). Social conditions have changed profoundly. 'All the familiar forms are still to be found. The feud persists, but it is something different from the internecine brawls of an earlier day. In the course of the tenth century, it becomes the conflict between two lords with men-at-arms. The professional bad man is only too evident, but he is no longer a man without substance who skulks in the woods, but as likely as not a *baro* with an adulterine castle for a retreat. Inquisitions there are, but they are taken by others than the king's judges' (pp. 125–126). In phrases such as these and in the lines drawn between the incursions of the Nordic pirates and the development of immunity jurisdictions (pp. 128 ff.) we have some contributions to a possible conception of political history as being (among other things) an almost uninterrupted series of unpunished crimes in the legal (not only moral) sense of the word, a conception which was quite familiar to the Dark Ages but has never been worked out in detail and would now be dismissed as thoroughly inappropriate.

We are thus prepared for a study of 'Criminal Procedure and Feudal Government' (Ch. IV) in Northern France and particularly in

Normandy. Contrary to what we would expect, having been brought up in the belief that the Middle Ages are a period almost entirely of customary law, the author accumulates evidence of a wealth of early feudal legislation (pp. 229 ff.), an oasis of budding law in the desert of those lawless times. (This has, however, been seen in its full importance already by H. Mitteis in *Lehnsrecht und Staatsgewalt*, 1933, pp. 337 ff.). The examination of these ordinances goes far to destroy the prejudice of the average legal historian that 'law possesses autogenetic power independent of circumstance' (p. 190, n. 4), for this examination shows 'the deadly pressure of social change upon the outmoded structure of rights and remedies' (p. 205). Composition now decays rapidly and the control of wrongdoing becomes largely a source of income for the court-keeping immunists both lay and cleric. Professor Goebel calls it a 'monument to the rapacity of the age that it contributes nothing to procedure, and everything to the sanctions of the judgment' (p. 279). This is shown with respect to death penalty, forfeiture of chattel, escheat of land and other elements of the later English conception of felony, elements which are all developed in pre-Conquest Normandy as a compromise between the old Frankish law and the exigencies of the new feudal society. The fifth chapter is dedicated to the other elements of English criminal law contributed by the Normans: God's Peace and Duke's Peace. It is by these means that the power to punish crimes was centralized, which was, of course, the only way to overcome the feudal anarchy. Professor Goebel describes how the growing ducal jurisdiction (before and after the Conquest) gradually overcomes baronial and clerical franchise in practice, though conceptually it is 'meaningful' to speak of franchise, being an exception, only where a concurrent central jurisdiction exists (pp. 280 ff.). The way to this goal leads through the truce of God which was not only a pious and socially useful undertaking but 'also dictated by churchly self-preservation' (p. 299); this same necessity made the church notwithstanding its own immunist interests wish and work for the establishment of the Duke's peace too (pp. 297, 329 ff.). The author shows that contrary to what some other writers have assumed (cf. p. 282) in Normandy as well as in the Empire *Landfrieden* evolved from *Gottesfrieden*. The last chapter takes us over the Channel and links 'Anglo-Saxon Institutions and Norman Justice'. The discussion now goes into great technical detail and is largely linguistic (on *bot*, *wite*, and *angyld*, *sac* and *soc*, *toll* and *team*), but the expert on Anglo-Saxon law and language will find the thread that leads through this maze. The preservation of these terms of art in the Conqueror's writs and charters gives an air of continuity to his policy towards franchise and immunity (p. 379), but they are all reinterpreted in view of the political and social changes which the conquest produced in England, particularly in procedure: 'for a leader coming in with an invading army, criminal law is not a minor administrative detail to be attended to at leisure' (p. 409). This sound idea dominates a penetrating study of the Conqueror's first ordinance, the *Lad*, which regulated proof in causes between English and French. Here the question arises what the Normans, the heirs of the Franks, now inherited from the English. For the last time the scope and meaning of outlawry are discussed; again Brunner's 'peacelessness', taken up by Liebermann, is reduced to its proper limits, and resolved in 'three distinct legal concepts which cannot be lumped together as manifestations of outlawry', viz. process upon

flight, exile, loss of the King's grace (p. 419, n. 289). Pollock's theory that 'every man has his own peace', sponsored by Maitland and Holdsworth, is considered a misstatement of the peace associated with every house (p. 428, n. 334). Even Henry I's peace, supposed to have been his great contribution to criminal law administration, 'shrinks to what it had ever been in England, a scheme of special protection' (p. 439).

The reader of this review will probably desire some indication of the author's results concerning 'Felony and Misdemeanor'. But I have found only the one mentioned above; according to the Index 'misdemeanor' does not appear at all and the term 'felony' in a very few places only. This is evidently to be explained by the fact that the problem indicated by the title does develop in a period later than the one covered by the present first volume: this volume stops at the year 1135, whereas the second volume, which the author is writing together with Mr. J. Langbein, is to deal with the time of Henry II and the beginning of the Year Book period (p. x). It will therefore be for the reader of this future second volume to decide whether the first was really the inevitable introduction to the history of the problem or, as the subtitle suggests, merely a sequence of several studies in the history (and pre-history) of English criminal procedure centred round the problem of outlawry. Even in this case Professor Goebel's book would be an outstanding contribution to historical jurisprudence. The 'Publications of the Foundation for Research in Legal History, Columbia University School of Law' of which the author is the editor, could not have started under better auspices.

HERMANN KANTOROWICZ (CAMBRIDGE).

Punishment, its Origin, Purpose and Psychology. By HANS VON HENTIG, formerly Professor of Penal Law and Criminology at the University of Bonn-am-Rhein. London: William Hodge & Co., Ltd. 1937. 239 pp. (12s. 6d.)

PENOLOGY, or the study of punishment, forms one branch of pure criminology. Criminology is a complex science and, like most sciences, is described in technical language which the untrained person usually finds repellent. When the young student-at-law reads that its branches concern such topics as anthropology, sonology, psychology, psycho- and neuro-pathology, penology, and so on, he may be forgiven if he supposes it to be a subject too extensive for his time and powers, or even a matter for ridicule, as for instance when he sees in an advertisement puff that a writer of detective stories is described as a criminologist. He will instinctively hope to be told that this subject is not a necessary part of his education, and indeed that *qua* lawyer he has nothing to do with it whatever. He will probably not realize that criminal law, evidence, and procedure form an element of criminology; but this ignorance is not surprising because it is true that apart from this element the subject of criminology has so far found little or no place in the curriculum obtaining in our universities and law schools. It is thus possible for the student to pass examinations which qualify him to engage in the practice of the

law and to represent the interests of clients whose very lives may be at stake without having to answer one single question which requires any knowledge at all of pure criminology. But however ignorant he may be of the fact he cannot, if he practises in the criminal Courts, escape being faced with problems of fact which can only be solved by the application of the principles which pure criminology exists to ascertain and test. For criminology in its broadest aspects when described in simple words merely means the study of four questions, first, what is crime; second, what are the causes which lead a man to commit crime; third, to what extent and by what means can a man be prevented from committing crime; and fourth, what is to be done with the man who has committed crime. Criminal law, as every beginner learns, is largely concerned with the mental state of the accused person: criminology involves the study of that mental state. Forensic practice, also, involves an appreciation of the psychological reactions of witnesses. It may be that counsel need not speculate on the effect on the convicted man of any particular punishment, but the barrister one day becomes the judge and in most crimes the judge has a discretion in the matter of punishment. It is customary to assume that the judge exercises that discretion with a view to fulfilling some purpose or other. He is therefore necessarily involved in a problem of penology. If he has not studied this science he can at best be an empiric, and must not complain if he be regarded as a dispenser rather than as a physician: a dispenser, moreover, who, ignorant of the causes of the illness, prescribes drugs without any responsibility for the consequences to the patient. It would be monstrous to suggest that when a judge condemns a prisoner to be flogged until his back is cut open, he is inspired by a pathological desire to inflict pain; it must be presumed that he intends to effect some good result by this drastic surgical operation without anaesthetic, that he wishes by its means either to deter, or to improve, or both. A study of penology will enable him to examine the results of research into the behaviour of the convicts before, during, and after the infliction of the torture, its effects on the inmates of the prisons, whether prisoners or officials, and its effects on the population at large, a research which constantly works on such material as the recorded experiences and observation of prison officials and qualified medical experts. He may then be in a position to decide whether his desire to do good can be fulfilled. Unfortunately, books on criminology by Englishmen are comparatively few; the bibliography of a recent work (itself a translation) gives 166 books of which only thirty-two are written in English, and these are nearly all American. It is to foreigners that we must at present look and we therefore welcome a translation of a work on punishment by so distinguished an investigator as Professor Von Hentig. The author's intellectual power is revealed by his extraction of essential principles from the mass of material which his prodigious learning has enabled him to assemble. The book seems to have suffered in the translation, for the style is congested and the English is in some places awkward. But it is a work which every one interested in the problem of crime should be advised to read and, it may almost be said, one which all those who are concerned with the infliction of punishment should be compelled to read. The first chapter consists of an abstract discussion of the nature and scope of punishment regarded as a means of preventing disobedience to rules of conduct. Then follows a long chapter on the evolution of punishments which have been actually

inflicted. The author shows that the idea of doing harm to another has not always been the immediate purpose of the steps taken against the offender. For example, outlawry begins as a measure of defensive expulsion of a source of danger to the community. The desire to preserve primitive family discipline is the origin of some cases of primitive severity, while religious ritual is shown to have given rise to many others, such as hanging which began as an offering to the gods of wind and storm, and flogging which was intended to beat out evil spirits. These ancient punishments were inflicted for ages as a matter of custom, but at a much later period men began to speculate on their nature and then various reasons for them were invented at different times. These are dealt with in the third chapter, under the head of 'Mental Classifications'. The most commonly adopted of these explanations was that punishment rested on divine command. This persisted even when men turned from one deity to another one. In more modern times, with a modification of religious outlook the responsibility is transferred to a personified abstraction such as 'Justice'. This nonsense has flourished among the philosophers, some of whom have come to absurd conclusions. Thus Kant in effect adopted the ancient *lex talionis* and held that as only death is equal to death even a community which has agreed to dissolve itself and to disperse, must first execute the last murderer in prison so as to escape blood guilt. The early magical and sacerdotal elements of criminal law had to recede before the empirical method of treatment, but Von Hentig points out that although the former may be said to have disappeared the sacerdotal element still holds a prominent place both in theory and practice. Justification for infliction of punishment in modern times is most commonly sought for in the purpose of Selection (*i.e.* the gradual production of a non-criminal type of man by various methods of elimination) or of Deterrence, or of Reform: often there is a hazy combination of the three on a principle similar to that adopted by a medical practitioner who, reading that each of several different drugs has been reported to have apparently effected good results in some but not all cases, puts them all together in one prescription and hopes for the best. Two further aims are often recognized, namely protection of the community by preventive detention of the criminal and the cure of the wrongdoer by some kind of compulsory medical or surgical treatment. The benefits which may result and the dangers which beset each of these courses of proceeding with criminals are carefully analyzed in this chapter.

The idea of revenge is as a rule not stressed by those who support the continuance of the old methods of punishment; but it is possible even now to find statements by Christian writers to the effect that some gratification should be afforded to the feelings of the victim of crime, while it is a quite common view that punishment of an offender elevates the moral feelings of the community. This view is often combined with atavistic notions such as were held by Kant, in association with the personification of 'Criminal Justice'. These arguments are of course the best justification for those manifestations of mass justice which from time to time occur in certain of the United States of America when a man or woman guilty or at least suspected of an offence is publicly executed by slow burning or other lingering process. For in these cases the victim of the alleged offence may be gratified, the moral feelings of the community elevated, and if the late Lord Justice Fry was right in

his statement that 'the object of punishment is to adjust the suffering to the sin' the organizers of the execution can feel satisfied that they have achieved yet a third merit. There is indeed no one of the grounds for punishment, however primitive, which is not available to be adopted, consciously or unconsciously, by a mind which operates by instinct uncontrolled by appropriate education. The fourth chapter discusses the methods usually employed at the present day, *i.e.* capital punishment, corporal punishment, sterilization, deportation, imprisonment, preventive detention, fine, and degradation, of which space does not permit any account in this review. The final chapter consists of an essay on the development and future of punishment. In the author's view all the methods of treatment which afford hope of beneficial results in serious cases of crime require some form of internment of the delinquent. For habitual criminals, the hopeless cases (whose number will diminish as our knowledge increases) permanent enclosure will be necessary; for the others, medical or educative treatment in open or semi-open institutions, on the lines of the American Prison Camps or 'minimum security prisons'. We in England have made a beginning with New Hall Camp, Wakefield, and this forms an example which will be followed throughout the country when our people finally come to realize that it is in their power to organize the life of the whole community on principles of reason.

J. W. C. T.

International Law. Vol. I, Peace. By L. OPPENHEIM. Fifth edition by H. LAUTERPACHT, LL.D., Dr.Jur., Dr.Sc.Pol., Reader in Public International Law in the University of London. London: Longmans, Green & Co. 1937. lvi and 819 pp. (45s. net.)

'ONE effect of the World War has been to produce among international lawyers a widespread dissatisfaction with the inadequacies of existing laws and legal philosophy and a conviction of the necessity of restating much of the law and finding a new basis for it.' Thus runs the second footnote in the volume under review. There can be no doubt of the truth of this statement or of the fact that much criticism has been directed, not indeed against the detailed exposition of Oppenheim, but against what may be termed the 'bases' of his system.

For the work of the present editor in bringing the detail of *Oppenheim* up to date no praise can be too high. *Oppenheim* has long ceased to be a satisfactory text-book for the ordinary student, but it remains more than ever the indispensable starting-point for any conceivable piece of research. Some fifty new sections (set out on pp. vi and vii of the Preface) have been added, and yet by judicious excisions and a reduction in the size of the type it has been possible not to increase the size of the work. In the references to current literature in every tongue, and in the citation of recent cases and incidents, nothing seems to have escaped the editor. It is the supreme skill and care that have been devoted to this task which give such high value to this edition, and earn the gratitude of all workers in the field of international law. It will occur to but few

to go farther and to inquire—what has happened to the fundamental doctrines of Oppenheim, and the ‘bases’ of his system?

It may be said at once that to change them would have been to write a new text-book, not to edit *Oppenheim*. There are frequent modifications, e.g. in § 2 we are told that there ‘is not’, but no longer that there ‘cannot be’ a sovereign political authority above the sovereign States. Sometimes the editor has inserted his own views, as in the new § 71a, where recognition of a new State is treated no longer as a matter of discretion, but as a duty which must be performed by other States, acting in a quasi-judicial capacity, when certain conditions are fulfilled. More questionable is the editor’s adoption of the ‘monistic’ view of the relation between international and municipal law. It is impossible, we are told on p. 40, to accept the view that rules of International Law cannot, without express adoption, operate as part of Municipal Law ‘unless we abandon ourselves to pure dialectics’. This is indeed a terrifying threat, but it leaves the reviewer unmoved, since the alternative to pure dialectics seems to be acceptance of the epistemology of the Viennese ‘pure science’ of law.

The influence of the Viennese school is again apparent in § 493, p. 695, where the binding force of treaties is under consideration. ‘Treaties are legally binding, because there exists a customary rule of International Law that treaties are binding’. Why is that customary rule binding? Oppenheim would have answered ‘because by common consent it shall be enforced by external power’. That for Oppenheim was what ‘legal bindingness’ meant. But the editor replies—‘The binding effect of that rule rests in the last resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of International Law.’ A note then refers us back to p. 15 where footnote 2 commends for our assumption an ‘initial hypothesis’.

If one is not an avowed ‘naturalist’, is it necessary to assume anything in the science of International Law? Lawrence asserts, in § 1 of his text-book, that the chief business of the science is ‘to find out by observation the rules actually followed by States in their mutual intercourse’. This surely is the first duty of the would-be international lawyer. If, further, he wishes to establish that these rules are not merely followed but also binding, he must investigate the problem of sanctions. If no sanctions are discoverable he must be content to be called a historian: if moral sanctions can be construed, a moral philosopher: if a sanction of merely opinion appears, he is an exponent of positive morality: if something more than mere opinion, he may begin to lay claim to be considered a positive lawyer. Is it permissible to bolster up this claim by *assuming* ‘the objectively binding force of International Law’?

One would not cry ‘Back to Oppenheim!’ Oppenheim is too unsatisfactory for that. ‘The Law of Nations’, begins Oppenheim, ‘is . . . the body of . . . rules which are considered legally binding by civilised States . . .’ It is too easy to criticize this. What if States are wrong in their considering? Would it then turn out not to be law at all? He is better when he defines law, in § 5, as a ‘body of rules . . . within a community which by common consent of this community shall be enforced by external power.’ But why drag in common consent? No one will deny the sociological importance of common consent, nor its legal importance in a system for independent States, but the present generation has seen too much of the possibilities of dictatorship to agree that common consent in

anything like the ordinary meaning of that term is a necessary element in a legal order. Yet the 'common consent' of States is essential to Oppenheim and serves not only as the starting point of his most questionable propositions, such as that 'States solely and exclusively (apart from the League of Nations) are the subjects of International Law' (§ 15, 4th ed.), but also to give an air of necessity to such embarrassing doctrines as that of the equality of States (§ 14).

We may sum up by saying that the editor has maintained the fundamental 'bases' of Oppenheim while endeavouring to modify their consequences in particular cases. The phrase in § 13 quoted above becomes, for instance, 'States are the principal subjects of International Law'. In so far as this attempt could succeed it has succeeded, but sometimes the editor has found it necessary to go farther and introduce into the text the new and questionable 'bases' of the Viennese school. The resulting amalgam is not entirely satisfactory to the philosophically minded.

One hopes, and with some confidence, for a completely new text-book from Professor Lauterpacht—or rather for two new text-books, one for students and one to replace *Oppenheim*. We may congratulate ourselves on the fact that when these books appear their author will sign himself 'Whewell Professor of International Law in the University of Cambridge'.

B. E. K.

Carver's Carriage of Goods by Sea. Eighth edition by JAMES S. HENDERSON, Barrister-at-Law, and SANFORD D. COLE, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. cvi and 1131 pp. (50s.)

FOURTEEN years have passed since the seventh edition of this book was published, during which there has been a very large number of decisions on this branch of the law. *Carver* has had hitherto an enviable reputation for completeness and reliability, both of which are important characteristics in a work intended almost exclusively for use by practitioners. Unfortunately the present edition falls considerably below the previous high standard, particularly in the matter of completeness and accuracy. To take the omissions first. In a book devoted to carriage by sea of over one thousand pages we have found no reference to the following cases decided since the last edition: *Monroe v. Ryan* [1935] 2 K. B. 28 (the availability of exceptions before commencement of the charterparty), *Brostrom v. Dreyfus*, 38 Com. Cas. 79 (safe port), *The Arpad* [1934] P. 189, although there is a whole chapter devoted to The Measure of Damages, *Barnett v. Danube & Black Sea Shipping Agencies* [1933] 2 K. B. 438, *Carras v. London & Scottish Assurance* [1936] 1 K. B. 291 (commercial frustration of contract of carriage), although *Kulukundis v. Norwich Union* [1937] 1 K. B. 1 is cited, *Dawson Line v. Adler* [1932] 1 K. B. 433 (implied indemnity), *Kaye S.N. Co. v. Barnett*, 48 T. L. R. 440, *Paterson S.S. Ltd. v. Robin Hood Mills, Ltd.* 58 Ll. L. R. 33 ('actual fault or privity'), *Strathlorne S.S. Co. v. Andrew Weir & Co.* 40 Com. Cas. 168 (owners' indemnity from time charterers) and *Connolly Shaw, Ltd. v. A.S. Det. Nordenfjeldske*, 49 Ll. L. R. 183 (deviation and frustration). All the above appear to be omitted entirely and there are at least

a score more of other cases of first-rate importance, all decided since 1930, to which no reference whatever is made.

Some cases are mentioned but on the least important points decided, particularly *Hain S.S. Co. v. Tate & Lyle, Ltd.* 41 Com. Cas. 350 which is only cited for the general average points, and no reference is made to the *dicta* on Deviation or the claim for freight based on *quantum meruit* after deviation. *Dreyfus & Co. v. Tempus Shipping Co.* [1931] A. C. 726 is referred to in the table of cases (p. xxxii) as being in S. 373b at p. 543, where it is most inadequately cited on the meaning of 'fire' and the York-Antwerp rules: under the title of *Tempus Shipping Co. v. Dreyfus & Co.* (p. xci) three references to the text are given to Ss. 24, 83, and 126, of which the first two are correct but there is no reference at all to the case in S. 126. Finally to complete the muddle there is no reference in the index of cases to the citation of the case at p. 1042 in the York-Antwerp Rules. The effect is that the case is twice cited in the Index of Cases and both citations refer to different references in the text: one of the references to the text is wrong and one reference in the text is not mentioned in the case index at all. Other cases fare nearly as badly: *Dampskibsselskabet Botnia v. Bell & Co.* is cited on p. 384 and a reference given to the Times Law Reports: it is also reported in [1932] 2 K. B. 569 and in at least four other sets of reports: notwithstanding this we cannot trace it anywhere in the case index in *Carver. The Adriatic* [1931] P. 241 is cited on p. 316 but is not in the case index. The case index states that *The Dimitrios N. Rallias* (1922) 38 T. L. R. 902 is to be found in Ss. 101a and 102a: it is in fact at 102 and 102a. In our experience a case index which is not complete and reasonably accurate is extremely misleading and dangerous. All the cases on the 'ice-breaker clause' are omitted, and although they may turn on a particular form of clause, they are important to the specialist, for whom this book is intended, and should certainly be included in a note somewhere. At pp. 169—181 will be found a full treatment of the Harter Act, although this Act is by now almost a dead letter: moreover in spite of note (II) at p. 170 there are several important points of difference between the English and American Carriage of Goods by Sea Acts. In the index under 'Exceptions' there is a reference to S. 705 as dealing with the protection of the shipowner against claims in tort: S. 705 does not in fact appear to deal with this at all and the reference in note (a) (p. 987) might well have been to the 10th edition of *Mayne on Damages* which was published as long ago as 1924 and not to the 9th. Further, any reference to the shipowner's liability in tort is incomplete without a mention of Lord Sumner's judgment in *Elder Dempster & Co. v. Paterson Zochonis & Co.* [1924] A. C. 522 at p. 564. The judgment, however, is nowhere referred to in this connection. In the same section of the index there are two references to S. 586a. There is no such section in the text. Minor misprints abound, e.g. 'Chellen' for 'Chellew', 'Tyndale' for 'Tynedale' and 'p.' for 'P'.

Two final criticisms are, first that the new sections have often been added in a most unattractive and inelegant style: for instance S. 57a (pp. 80—81) has obviously been prepared as a note and inserted without revision and all the references to the cases appear in the text and not as usually in footnotes: this gives the book a most uneven appearance. Secondly, and most important, the editors have not included references to Lloyd's List Reports. This series is in constant

use in the Commercial Court and in the chambers and offices of those who are concerned with this branch of the law; it is certainly most desirable that cases cited should have their Lloyd's List references appended to them, if not in the footnotes at least in the Index of Cases.

We regret that this review of so well-known a book should be so severely critical, but this edition shows how important it is to preserve in each new edition the care and experience which have gone to build up the reputation of a leading text-book. The present editors have unfortunately not succeeded in their efforts to do this. Since 1924, much law has been decided in the Commercial Court, but it must be admitted that Carver's treatise has for the moment failed to keep abreast of the stream; it is still a standard work but it has lost much ground and will require much careful revision and undoubtedly many additions in the next edition if it is again to become worthy of its considerable reputation.

P. H. D.

A Text-Book of the Law of Tort. By P. H. WINFIELD, F.B.A., LL.D.(Cantab.), Hon. LL.D. Harvard, Rouse Ball Professor of English Law, Cambridge, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. xl and 728 pp. (30s.)

HERE is the 'book of the year'; an outstanding production ranking in authority with *Pollock* and *Salmond*. It is really new, its rare charm of style, its enlivening, amusing and interesting references, *e.g.* to early football, p. 30, Pickwick's ejectment, p. 59, etc., its accuracy and clarity, and its method of approach will make it the most popular book on tort. No difficulties are shelved, and there is a penetrating analysis of difficult and doubtful points, whilst such 'authorities' as exist are marshalled both for and against the author's well-reasoned solutions to the 'blind spots' of tort. There is a concise account of the historical development of the rules and the reasons therefor. No case or reference has been overlooked, the painstaking labour involved is evident on every page, and there are references to law reports and legal journals of the Dominions and those of the United States, and particularly to the *American Restatement*.

In Chapter I it is admitted that the definition of tortious liability is not completely satisfactory, but it is workable. *Pollock's* and *Salmond's* theories as to the foundations of tortious liability are discussed, and the conclusion arrived at is that all unjustifiable harm is tortious, or at least, this is 'nearer to the truth' to-day. The second chapter on the general conditions of liability is arresting. At p. 40 there is a critical analysis of reasons given by the Court of Appeal for their decision in *Haynes v. Harwood* as to the inapplicability of *volenti non fit injuria*, and at p. 42 the question of risk in the saving of property is raised. The sections on inevitable accident and act of God are particularly illuminating, and the scanty material on necessity is well weighed at pp. 62-5. At p. 71 we are warned of grievous disappointment if we expect a scientific analysis of causation. The *Polemis* and the *Liesbosch*

cases are carefully scrutinized; three rules are suggested, but with diffidence, at p. 79, and apt illustrations are given at pp. 80-88. It really seems impossible to postulate rules with reference to such uncertain terms as 'direct and natural', 'physical and immediate'.

In Chapter III on Capacity at p. 107, the first footnote (q) should read (p) *Larner v. Larner* [1905] 2 K. B. 539. At p. 107 the legal position of a volunteer who assists a servant is criticised, and an attempt is made to settle the problems raised in *Knott v. L. C. C.* regarding common employment at p. 148. *Fanton v. Denville* p. 144 must now be read in the light of *Wilsons & Clyde Coal Co. v. English* (1938). *Flower v. Ebbw Vale Steel Co., Ltd.* p. 147 does not appear in the table of cases. Two hunting cases come in for deserved criticism at p. 175.

Chapter VII on death in relation to tort contains a brilliant historical account, but in view of the House of Lords' decision in *Rose v. Ford* (noted in the Addendum) pp. 211-6 now requires amendment. In Chapter VIII reasons are given for the impossibility of a scientific classification of particular torts; they are mainly historical. The theory of a law of tort must yield here. The account of the overlapping of trespass to the person and negligence in Chapter IX is interesting, but the pleadings in such cases cover both negligence and trespass. At p. 233 attention is called to *Herring v. Boyle* which was overlooked in *Meering v. Grahame-White Aviation Co., Ltd.*, by the Court of Appeal. The statement at p. 235 as to when a private person may arrest appears to be misleading. 'Injuries Affecting Family Relationships' Chapter X, are truly said to be 'ragged in form and . . . unjust in substance': p. 244. At p. 253, footnote (f), *Watson* should read *Walton*.

Chapter XI on defamation raises many conundrums, p. 259—is defamatory matter on a gramophone record libel or slander, and what of skywriting? The criticism levelled against *Cassidy v. Daily Mirror* is met at p. 279, and the 'rolled-up plea' pp. 296-7 is really well explained.

Chapter XII deals with trespass to land, and in spite of conflicting cases an attempt is made to state a general theory of possession. At p. 331, l. 5 from bottom, *earlier* should read *later*, and a reference might be added to *Clore v. Theatrical Properties, Ltd.* [1936] 3 All E. R. 483 at p. 348. The difficulties connected with *Wood v. Leadbitter* and *Hurst v. Picture Theatres* are detailed at pp. 348-51.

In Chapter XIV on Conversion—one of the most difficult of torts—the 'blind spots' are well considered, particularly at pp. 394-5.

Chapter XVI on Negligence is of particular interest, for the author long ago advocated its independence as a separate tort.

In Chapter XVIII nuisance is historically explained, pp. 462-5, contrasted with negligence, pp. 499-502, and the element of malice is discussed at pp. 473-5. Under strict liability we have Chapter XIX—*Rylands v. Fletcher* and Chapter XX on Animals; the latter contains much new historical material. A separate chapter, XXI, is given to dangerous chattels, although the author suggests that negligence would be adequate to cover it.

Chapter XXII gives a comprehensive account of dangerous land and structures, and the ambiguity of the rules relating to invitees and those who enter as of right is dealt with at pp. 593-600.

In Chapter XXVI—Miscellaneous and Doubtful Torts—sound reasons are given for the recognition of the wrong of offensive invasion of privacy.

The waiver of remedies, especially of tort in favour of quasi-contract, is well considered at pp. 670-5. The final chapter on the relation of contract and tort is very useful. It is there submitted, but with some doubt, that where on the same facts alternative claims are possible, the measure of damages is wider in tort than in contract.

The reviewer has tried to touch somewhat inadequately upon a few of the chief points in one of the most stimulating and interesting of law books, one which is ever fresh, clear and arresting.

T. E. L.

The Trial Judge. By HENRY T. LUMMUS. Chicago: The Foundation Press, Inc. 1937. iv and 148 pp.

The Mind of the Juror. By ALBERT S. OSBORN. Albany, New York: The Boyd Printing Co. 1937. xiii and 239 pp.

JUSTICE LUMMUS has been an Associate Justice of the Supreme Court of Massachusetts for seven years, having previously been a judge in inferior Courts. His book is the substance of three lectures delivered at the Northwestern University. The contents, the easy style, the copious documentation, and the fact that the author speaks with the weight of great experience, combine to make a fascinating essay. The author is addressing his own countrymen, and if they have any complacency about their judicial machinery that complacency should be rudely shattered. The various methods of appointing judges are discussed; the picture of judges seeking election by party vote and then keeping their office by service to party is not attractive. Nor is the sober explanation of many pleas of guilty in criminal cases; defence counsel can bargain with the prosecutor, offering a plea of guilty in exchange for a promise of light sentence because they know that the Court has too many cases in the list to hear them all, whilst the right of the prosecutor to select the cases to be called in Court enables him to threaten actual trial unless a bargain is made. Most of the abuses are due more or less directly to the position of the judiciary, the author's conclusion being that "In its common mode of selection of judges, and in the prevailing tenure, American democracy has made its outstanding blunder and its most tragic failure."

Mr. Osborn also speaks from much experience. Professor Wigmore, who contributes an Introduction, points out that jury trial is not a single uniform institution but varies with court and place. Mr. Osborn has attended as expert witness before the Courts of most of the States and can thus supply the element that Professor Wigmore finds lacking in many publications. The book is somewhat verbose and discursive, and in its double columns of type has an unpleasing format. The chief aim is to explain the need for reform of the legal machinery. It is assumed that jury trial is fundamentally a sound institution (p. 172), but few will doubt the conclusion that justice under present conditions is frequently unobtainable. Again and again the author returns to the theme that the position of the judges is the core of the problem: judges must be carefully selected, given at least a long tenure of office, and must be invested with power to control the proceedings and to instruct the jury. The curse is the political appointment of judges, the situation where 'the

typical political judge is still paying his political debts' (p. 75) and where 'judgeships are political prizes distributed by political bosses' (p. 77). The office of prosecutor must also be taken out of party politics (p. 185). The chief obstacle to reform is said to be the legal profession (p. 203).

Both of these books refer to the English and the Canadian systems, in the spirit of 'See, a sound judiciary really is possible'. In fact, there is a danger to an Englishman in reading these books for he may begin to feel far too superior. The Englishman who has not read *English Justice* by 'Solicitor' had better do so before he contemplates the merits of our system. Many of the American problems do not arise with us, but ultimately the problems are much the same, since the essence is the harmonizing of an independent and competent judiciary with democratic control of all aspects of government. One factor in the American situation is very different. Under a constitution that allows judicial review of legislation the political views of the judges matter intensely, for a whole phase of government activity may be wrecked by an adverse judgment. English legislation that is unpalatable to the judges can be partially wrecked by judicial interpretation of the statute, but then fresh legislation can correct the error. A political function cannot be 'taken out of politics', and the political views of judges will appear more or less important according as there is much or little scope for introducing (whether consciously or not) the bias of a particular outlook.

R. M. J.

A Short Manual of Hindu Law. By H. D. CORNISH, of the Inner Temple, Barrister-at-Law, lately one of His Majesty's Judges of the High Court of Judicature at Madras. London: Stevens & Sons, Ltd. 1937. xxiii and 156 pp. (6s.)

THE publication itself, in England, of a book on Hindu law is an unusual event. This one is a successful effort to compress within some 143 small pages an abstract of the origins of Hindu law, and of its rules upon a selection of topics, marriage, adoption, the joint family, partition, maintenance, succession and woman's property. The ever-increasing output of case law has swollen to unwieldiness each successive edition of the classic text-books, and the bewildered student in search of a concise outline of his subject will find here what, in this country at least, he cannot find elsewhere. The book is no cram book. Although the author, very reasonably, has not attempted to make his citations of cases exhaustive, he quotes adequate authority for everything that he says. In a very few instances what is said is not quite up to date. The statement on p. 22 that a widow's power to adopt is at an end when the estate of the husband has vested in an heir to the last full owner, other than her husband, has been out of date since 1933, when the Judicial Committee's judgment was delivered in *Amarendra Man Singh's Case*. It is rather curious to observe what scant attention has been paid to this important pronouncement, both by the present writer and by another eminent judge of the Madras High Court, who edited the last edition of *Mulla's Principles of Hindu Law*. Its final result was that a son adopted, not

to the last male proprietor but to his father and predecessor, was allowed to oust from a separate impartible estate the heir of the last full owner, who had succeeded before the date of the adoption. This surely necessitates the rewriting of the general rule for the divesting of estates on adoption propounded on p. 28 of the present work, and supported, strangely enough, by a reference to the Patna High Court's decision reversed by the Privy Council in *Amarendra Man Singh's Case*. Yet, no doubt, it may be prophesied safely that the last word has not yet been written on this vexed question of divesting, to the literature of which the Bombay High Court, in particular, has been adding of late.

What must be another slip is the remark on p. 51, that the pious obligation to pay an ancestor's debts does not extend to the great-grandson. In 1926 the Privy Council ruled that it does (*Masitullah v. Damodar Prasad*). And, in the references on pp. 85 and 93 to the Hindu Inheritance (Removal of Disabilities) Act of 1928, the rather important qualification that it does not apply to Dayabhaga Hindus is not mentioned.

Another omission, unavoidable no doubt, but inevitably to be regretted, is that of any allusion to Act 18 of 1937, which came into force on April 14, 1937, five months before the date of the preface of the book; for this enactment seems destined to revolutionize the position of the widow in Hindu law, and, perhaps, also to stimulate considerably litigation on matters connected with woman's estate. On p. 95 the quotation from the *Mitakshara* might have been continued to include the description of degrees within which the *Sapinda* relationship is to be calculated. On the other hand, the author is to be congratulated upon the brevity with which he has treated *Bandhu* inheritance, a fit subject for application of the policy of letting sleeping dogs alone until some one else rouses them.

There is a good index, though not entirely complete. It helps a reader, for instance, to discover the rule for succession to *Sulka*, but not to find out what *Sulka* means. The author's purpose, nevertheless, is to be terse, and he has achieved both terseness and lucidity. Notable examples are the introductory history of the law, and the descriptions of joint family property and of the widow's estate, which so often in other text-books are diffuse and wide scattered, and here are neatly concentrated each in its appropriate place. There is hardly a superfluous sentence throughout, and the learned author is fully justified in hoping that his work will be of help to the practitioner, as well as to the student, for whom primarily it is intended.

A. C.

Law and Other Things. By the Rt. Hon. Lord MACMILLAN, G.C.V.O., LL.D. Cambridge: At the University Press. 1937. 284 pp. (8s. 6d.)

THE best tribute to the breadth and charm of this volume of addresses and essays is the warm appreciation of them which has been expressed not only by lawyers but also by laymen. Two of them we had the pleasure of hearing in Cambridge, 'Law and Politics', the Henry Sidgwick Memorial Lecture, and 'Two Ways of Thinking', the Rede Lecture. The chief doctrine of the first is that 'where social justice finds its true sphere is in securing that each shall have a fair and equal chance

of winning the rewards of life. Justice may equalise the opportunities of life but it cannot equalise the ability to take advantage of these opportunities'; the second is a comparison of the logical and empirical methods of thought and is to some extent an international match, Scotland v. England with an impartial Scottish referee.

Of the other twelve papers we can only select for comment those which appealed to us most, though all are delightful. 'Law and Order' emphasizes the need of an orderly mind for the purpose of successfully making and administering the law. And it is not only lawyers who would do well to bear in mind that 'order has an aesthetic as well as a practical appeal to us, for order is the basis of beauty and harmony as well as of efficiency'. 'Law and Ethics' was all the more welcome as it explores a region in which we had travelled ourselves, both in the Common Law at large and in the more restricted area of public policy. No one recognizes more clearly than Lord Macmillan, first, the essential relation of law and ethics and, secondly, that while their union is regarded in law reform by Parliament as respectable, nay honourable, yet the law Courts, although they unconsciously and continually apply ethics to law, are apt to repudiate the connection between the two as an indiscreet *liaison* if any advocate is rash enough to speak of it in public.

In 'Law and History', Lord Macmillan says, 'The real practical value of history to the lawyer is to be found in the guidance which it affords in dealing with present-day problems.' This view is fortunately gaining more and more acceptance. It is often difficult to state what the law is without knowing something of its history and always dangerous to attempt reform of the law without it. Lord Macmillan himself tells us that his brief in *Lord Advocate v. Marquess of Zetland* before the House of Lords took him back to 1469 and compelled him to sift the whole of the feudal system in Scotland.

Two addresses on 'Advocacy' are quite as instructive to the layman as to the lawyer, for it takes a great deal to convince a layman that the duty of an advocate is not necessarily to believe in his client's case, but 'to present to the Court all that can be said on behalf of his client's case, all that his client would have said for himself if he had possessed the requisite skill and knowledge'. There may be lay litigants who possess this requisite skill and knowledge. If so, we have never seen them.

At p. 138, Lord Macmillan quotes Dr. Johnson, as saying to Mr. Edwards: 'You are a lawyer. Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants.' If Johnson, Boswell and Edwards were alive now, the reviewer would send them all to talk with the author of this book, and would hope to remain as a listener himself.

P. H. W.

Journal of the Courts of Common Right and Chancery of East New Jersey, 1683—1702. Edited and with an Introduction by PRESTON W. EDSALL. Philadelphia: American Legal History Society. 1937. xi and 356 pp.

MR. EDSALL'S unexpected discovery of the manuscript of the 'Journal' and of the beginnings of a 'Record' of declarations, pleas, and indictments (see the preface, p. vi) has led to his presentation of a volume on

American legal history of much interest and value. He has edited the text of the *Journal* (pp. 157—331) and of the *Record* (pp. 335—340) with scholarly care; and he has added a *Table of Cases* (pp. 341—344) and an *Index* (pp. 345—356). His *Introduction* (pp. 1—154) is an important contribution to the history of law in America during the colonial era. In successive chapters he deals with the origin of the Court of Common Right, the Court's story, procedure in civil suits, forms of action, proprietary problems and the law, the criminal law, cases under the Navigation Acts, and the Court of Chancery. To the scholar interested in the extension of the English legal system to the colonies before the Revolution the chapters on procedure in civil suits, the forms of action, and the Court of Chancery are especially illuminating. Mr. Edsall shows us clearly that even when jurisdiction in law and equity had been given to the Court of Common Right, 'it seemingly did not occur to the judges to treat law and equity as a unit. Instead of giving judges power to apply equitable or legal procedure or remedies as might be necessary in a particular case, the double-empowerment, preserving a typically English separation, merely meant that they would sit in law or in equity. So principled, it was only natural that the Court's progress should be toward a division into two Courts, each with its own procedure and remedies' (p. 153; and see pp. 140—152, on the Court of Chancery). In East New Jersey during the closing decades of the seventeenth century, Mr. Edsall informs us, 'due process of law in civil and criminal cases followed closely the English model. In civil cases the common law actions which arose in England out of the writ of Trespass prevailed', but in criminal cases the substantive law differed much from that of England, being 'adjusted at once to the religious and moral sense of the community, and to the less brutal ideas of the founders of the 1683 code' (p. 153; on the code, see pp. 115—131). The provincial Court of Chancery had jurisdiction in such matters as discovery, account, specific performance, and fraud; its procedure differed, in some respects, from that of the English Chancery (pp. 148—152). As to the Court of Common Right, with which Mr. Edsall is chiefly concerned, he concludes that 'it was one stone in Britain's evolving colonial structure,—a stone cut with a knowledge of English ways, shaped with an eye to American needs, a stone with some strength and value, but not adequate to keep its place in the straining wall which was to topple with the American Revolution' (p. 154).

H. D. H.

Trusts on the Continent of Europe: A Study in Comparative Law. By F. WEISER, Dr.Jur., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1936. viii and 103 pp. (7s. 6d. net.)

AFTER a brief treatment of the nature of the English trust, with special reference to the views of Continental lawyers (pp. 1—14), Dr. Weiser deals with the trust as a problem of municipal law in various European countries, namely, Germany, Austria, Switzerland, Liechtenstein, France and Italy (pp. 15—70). His comparison of the trust with the *fiducia*, *Treuhand*, *prête-nom*, and other institutions and relationships of continental legal systems are of much interest; and his conclusions

are sometimes different from views already expressed by Friedmann, Hein, Lepaulle and other writers who have dealt with this subject-matter. Dr. Weiser concludes that 'legal thought in present-day Germany is in a state of gestation, which might one day lead to the creation of something reasonably comparable to and performing some of the functions of the Anglo-Saxon Trust, although the artificiality of many of the schemes that are being mooted does not seem over-promising' (p. 40). In speaking of France, he says: 'There is nothing in the practice of the French Courts to give the lie definitely to Underhill's sweeping statement that "the foreign judges appear to be quite incapable of grasping our idea of dual ownership—the legal ownership of the Trustee and the equitable ownership of the beneficiaries—regarding the Trustees merely as mandatories or agents for them and not as legal owners"' (p. 67). 'Italians', remarks Dr. Weiser, 'do not seem to have directed their minds to the basic problem of trust-like relationships until authors such as Ferrara, Ascarelli and Carita-Ferra adverted to the general phenomenon of "fiduciary transactions"'. To a considerable extent their writings pave the way to a proper understanding of that class of legal phenomena of which the Anglo-Saxon Trust is but one, through pointing out that their common characteristic is the combination of a "real" with a purely "obligatory" element' (p. 68; see also Remo Franceschelli, *Il 'Trust' nel diritto inglese*, 1935). Not only, concludes Dr. Weiser, does it require 'staunch optimism to believe in a future evolution of efficient trust-like contrivances on the Continent of Europe', but 'that one must be blessed with enviable light-heartedness to assume that on the other side of the Channel all and sundry have at the present time institutions and practices which allow trust-like effects to be produced, or at least to be properly understood' (p. 71). Comments on the trust in international practice (pp. 71—93) are followed by the author's suggestions for the drafting of some clauses in general bonds of international state loans (pp. 94—103). The reading of Dr. Weiser's small book will serve as a stimulus to further research, from the comparative stand-point, within the field of fiduciary relationships in modern systems of law.

H. D. H.

Modern Equity, being the Principles of Equity. By HAROLD GREVILLE HANBURY, D.C.L., M.A., Fellow of Lincoln College, Oxford; University Lecturer in Equity; Tutor, Law Society's School of Law; of the Inner Temple, Barrister-at-Law. Second edition. London: Stevens & Sons, Ltd. 1937. 1 and 814 pp. (£1 10s. net.)

THE first edition of Dr. Hanbury's masterly exposition of the principles of modern Equity (1935), already reviewed in the pages of this *Journal*, has been followed, after the lapse of only two years, by a second edition. This will be heartily welcomed both by the profession and by the many law students who have already gained instruction and inspiration from a work which now ranks as one of the authoritative treatises on the English legal system. As Dr. Hanbury remarks in his Preface, 'the face of the law is ever changing'; and in this new edition he has taken account of recent important changes wrought by statute and

judicial decision. Thus, the position of married women has been profoundly modified, since the publication of the first edition of *Modern Equity*, by the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935; and the disappearance of the restraint on anticipation renders obsolete, as Dr. Hanbury says, the rule in *Re Vardon's Trusts* (1886) 31 Ch. D. 225 (see p. 516), and 'cannot, it is conceived, do otherwise than alter the attitude of equity as regards an indemnity given by a married woman beneficiary who instigates a breach of trust' (p. v). Dr. Hanbury also comments on 'the most important recent decision', *Rose v. Ford* [1936] 1 K. B. 90 which, little more than a year after the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, threw the law into 'grievous uncertainty by the decision of a majority of the Court of Appeal' (pp. v, 491, 493); but as Dr. Hanbury states, his discussion of this case was of a merely temporary nature, since at the time when he wrote the decision of the House of Lords had not yet been given. Since the appearance of Dr. Hanbury's second edition the House of Lords has refused to extend the principle of *Baker v. Bolton*, 1 Camp. 493, and has held that under the Law Reform (Miscellaneous Provisions) Act, 1934, the personal representative of a deceased person who had been killed by the negligence of the defendant was entitled to recover damages for loss of expectation of life (*Rose v. Ford* [1937] A. C. 826). Comments upon this decision and the *dicta* of their Lordships as to the amount of the damages have already begun to appear (see e.g. *Clerk and Lindsell on the Law of Torts*, ninth edition, 1937, pp. 212—218; *Law Quarterly Review*, January, 1938, pp. 1—3, 135): Dr. Hanbury's observations will be awaited with interest. In the present edition he has omitted several matters, including the statute 27 Eliz., c. 4, on voluntary conveyances, and about fifty old cases; but, on the other hand, he has included approximately the same number of new cases (see pp. v—vi). The recommendations of the Law Revision Committee on the working of the Statutes of Limitation form the subject-matter of a brief Appendix (pp. 633—34). An excellent Index (pp. 635—814) will guide the reader to the learned author's treatment of the many principles and problems of the equitable part of our system of civil law.

H. D. H.

The Law of Trusts. By GEORGE W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Reader in English Law in the University of London, Vice-Dean of the Faculty of Law, University College, London. Second edition. London: Sir Isaac Pitman & Sons, Ltd. 1937. lii and 412 pp. (25s. net.)

THE first appearance of this book, in 1934, was welcomed on all sides, and it is now generally recognized as one of the leading textbooks for students of the Law of Trusts. The text of the second edition, now under review, is longer by twenty-two pages than its predecessor; a really useful index of subjects (44 pp., formerly 12 pp.) is provided; and the index of cases, in addition to accretions due to the expansion of the text and the inclusion of some forty recent decisions, has been perfected. The text has evidently been carefully revised, and valuable additions have been made

to it. These include a number of passages from the American Restatement of the Law of Trusts (*e.g.* pp. 3, 11, 55—indexed only for p. 3); the distinction between Trust and Agency (p. 11—where something might be said to avoid the impression that agency cannot arise without consent); a fuller explanation of the *Re Chardon* line of cases (p. 146); a number of helpful additions to Chapter XIV, on Apportionment; and a welcome explanation of the operation of the statutory power of maintenance (pp. 277-281—the question, raised at p. 280, whether capital can be used for maintenance, might usefully have been considered in relation to the statutory power of advancement).

In two respects, perhaps, the learned author was unfortunate in that the popularity of his work so soon demanded a second edition. Apparently the Law Revision Committee's Interim Report on the Statutes of Limitation (now to be found in Weekly Notes, Jan. 2, 1937) appeared too late for mention in this volume; and an important case on secret trusts, *Re Keen* [1937] Ch. 236 did not leave the Court of Appeal until early in 1937. Although *Re Keen* has aroused some criticism (see an article by Sir William Holdsworth, 53 L. Q. R. 501) the line which it took had been anticipated in some quarters (*e.g.* Dr. Wade, 45 L. Q. R. 282; Dr. Hanbury, *Modern Equity*, 2nd edition, 147-148); and it is thought that Dr. Keeton, in the light of this decision, may feel compelled to modify his views upon *Blackwell v. Blackwell* (pp. 54-55). There are some other aspects of the section on secret trusts (pp. 51-64) which might be considered when the next edition is undertaken. At present it contains much information; but one feels that it is rather less illuminating than the rest of the book. Thus, the first two propositions of the section (pp. 52-53) are not stated very clearly, and hardly give a clear impression of the decision in *Re Boyes*; moreover, *Re Williams* would seem more appropriate to this section (*e.g.* at p. 62) than to that on precatory trusts (p. 80); and the student may be puzzled at p. 57 (should not 'Mortmain' there read 'Frauds'?) where the subject is suddenly approached anew, to be developed historically from the early cases. These few observations are made in the belief that an important textbook, such as this, is likely to run to many editions, in each of which the learned author will seek to enhance its value. The edition under review should undoubtedly enhance the high reputation achieved by its predecessor.

S. J. B.

The Settled Land Acts. By J. C. ARNOLD, LL.B., of the Inner Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1937. xxiii and 384 pp. (25s. net.)

PART I of this book consists of ninety-eight pages entitled 'The Framework of the Modern Law of Settled Land'. Part II (262 pp.) contains the text of the Settled Land Act, 1925, with annotations. Part III (7 pp.) contains notes on probate grants of settled land. According to the Preface, whilst the second part is treated from the standpoint of the practitioner, Part I is designed to give a comprehensive idea of how the law of settled land has 'kept pace with the march of custom and the modernization of tradition'. In fact, however, Part I contains very little of a historical nature. It might fairly be described as a commentary upon the modern law; and the vast majority of the citations are sections

of the Settled Land Act, 1925. The fact that this Act is not included in the index of statutes may therefore occasion some difficulty to the zealous reader; for, although he is given (in Part II) the text of the Act, he cannot easily find cognate passages in the commentary. Thus, section 17 (deeds of discharge) is discussed at pp. 49, 52, 63; but nothing in the index of statutes or the index of subjects (*s.t.* Discharge, deed of) tells one so. Indeed, it is not easy to see what type of reader Part I is intended to serve. One feels that a beginner would prefer a rather more lucid and concise introduction to the Act, and that some passages in Part I might well mislead him: *e.g.* that a vesting deed executed for a pre-Act settlement confers the legal estate upon the life tenant (p. 23; *cf.* p. 343); that 'the ordinary tenant for life may not necessarily be a life tenant under an entailed interest' (p. 29); that a tenant for life 'is in exactly the same position as a tenant for years' as regards voluntary and permissive waste (p. 38); that 'portions for younger children precede the estate of the tenant for life' (pp. 53, 58, 61); and that a *legal* estate may have 'sprung into existence . . . in the case of a resulting trust' (pp. 57—58). For the experienced reader, on the other hand, one feels that the mode of treatment in Part I is too slight. Thus, pp. 14 and 32, which deal with (but are not indexed under) restraints upon anticipation, are inadequate as to the effect of the Law Reform Act, 1935 (see the footnotes to these pages, also pp. 160, 169); and the protective trust, which is now likely to be used instead of such restraints, appears to have been overlooked entirely. Moreover (contrary, it is thought, to current opinion) the impression is given that a deed of discharge is invariably necessary to terminate a settlement (pp. 49, 52, 63; *cf.* p. 148).

The real value of this work would seem to lie in Part II. Its notes to the sections of the Act of 1925 are both helpful and reasonably exhaustive. Unlike the more concise notes in Wolstenholme and Cherry, which cover much wider ground, these notes fully explain the points with which they deal and give the facts of recent decisions. Moreover, apart from occasional trifling lapses (*e.g.* p. 114, l. 31; p. 172, l. 16), they impress one as both readable and accurate; and one feels that the reader would be adequately served (presumably at a lower price) even though Part I were omitted. The appearance and format of the book are admirable.

S. J. B.

The Liverpool Tractate. An Eighteenth-century Manual on the Procedure of the House of Commons. Edited, with an Introduction, by CATHARINE STRATEMAN, Ph.D. New York: Columbia University Press. London: P. S. King & Son, Ltd. 1937. xcii and 105 pp. (11s. 3d.)

DR. STRATEMAN has made a real contribution to the literature of constitutional history by presenting to scholars the text of the Liverpool tractate, hitherto unprinted, and by writing a long and valuable Introduction. The medieval *Modus Tenendi Parliamentum* forms the beginning of a long series of tractates dealing with the procedure of the House of Commons. In her Introduction, Dr. Strateman sketches in a masterly way the history of this important species of literature, both before the

date of the composition of the Liverpool manual (*circa* 1763) and afterwards. The historical value of the Liverpool tractate (volume 267 of the Liverpool Papers in the British Museum, catalogued as Additional Manuscript 38456) lies in the fact that, while the seventeenth and nineteenth centuries are rich in manuals on the procedure of the Commons, there is a distinct dearth of writings of this description in the eighteenth century: the Liverpool tractate (*circa* 1763) fills the gap between George Petyt's *Lex Parliamentaria* (1690) and John Hatsell's elaborate *Precedents of Proceedings in the House of Commons* (vol. I, 1776, reprinted 1781; vol. II, 1781; vol. III, 1785; last vols., 1796).

The text of the Liverpool tractate (pp. 1—94), which has been edited with scrupulous care for accuracy, has been illumined not only by Dr. Strateman's footnotes, but also, and more especially, by those portions of her Introduction in which she deals with the problem as to the identity of the author of the manual (who may have been George Grenville; see pp. xi—xviii), the nature of the materials used by the author, and the character of the manual's contents. Especially illuminating, from the historical point of view, are the learned editor's notes on the development of procedure during the decades from 1689 to 1760 (pp. lxi—lxxx), the period immediately preceding the composition of the Liverpool tractate. It is precisely this period, when there was the lack of contemporary manuals, which needed the light that Dr. Strateman has thrown upon it. The Liverpool tractate itself continues the story.

No mention can be made in this brief notice of the many interesting points of detail considered by Dr. Strateman; and her general conclusions, which are of equal interest and value, must also be left for the attention of the reader of her volume. Only two sentences from the Introduction can be reproduced in the present place. 'The "transfer of government to the floor of the House" [she remarks] was an eighteenth century development; but the change in procedure lagged far behind.' 'From the tractates on procedure, as well as from other sources, it appears that developments in procedure belong to the nineteenth, rather than to the eighteenth century, and that they are easily explicable and easily ascertained from the various standing orders after 1800, and particularly after 1832' (p. lxxx). The bibliography of tractates, both printed and manuscript (pp. lxxxi—xcii), and an adequate Index (pp. 95—105) will be welcomed by the student of the procedural history of the House of Commons.

H. D. H.

The Law of Gaming. By HOWARD A. STREET (I.C.S., retired), of the Inner Temple and of the King's Inn, Dublin, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. lxiii and 760 pp. (42s. net.)

THIS is a difficult book to review. It was no doubt a difficult book to write. 'The betting laws of this country', said the late Mr. Justice Swift, 'are in a tremendous mess, and something ought to be done about it, but nothing is done. Nothing will be done. It is a hopeless mess, and everybody is afraid to touch it.' Mr. Street has made a valiant attempt to understand the mess and explain it. But no rational explanation is possible. Too many unrelated factors have found their place in

the final composition of the law. The Common Law was far from clear, and the statute law which has been superimposed on this unsure foundation has emanated from the minds of legislators with no sure purpose and a lack of unanimity resulting in illogical compromise. All this is well revealed by Mr. Street, who has not been content merely to state the law as it is, or as it appears to be, but has quite fearlessly traced the history of every branch of his subject. It must have been a tremendous task. Part I, consisting of four chapters and 230 pages, is devoted to a careful consideration of definitions alone. Part II deals with the criminal law, and Part III with civil actions. Part IV is concerned with foreign law, notably with the law of Ireland and the law of Scotland. It is, with respect, submitted that this Part might well have been omitted. An irrational subject does not lend itself to comparative study. No one can wish to know anything about the Law of Gaming save for practical purposes, and these purposes are not concerned with foreign law. It was, however, the author's original intention to include dominion law as well; but even Mr. Street was daunted when it came to the point, and his work loses nothing of value by the omission.

It is, alas, notorious how few legal text-books are written in a presentable style. Mr. Street has clearly appreciated that there is no reason why good law should be divorced from good English and his model has been, perhaps, *Dicey*, rather than *Archbold*. But, though he has avoided the scrappiness of the average practitioner's book, his constructions are too often unnecessarily involved and sometimes make really difficult reading.

As to his law: while it would be presumptuous without considerable research to contradict his conclusions, it is permissible sometimes to doubt them. He himself appreciates this. He would like to challenge the maxim that all games are lawful at Common Law; but, while advancing learned, though not wholly convincing, arguments to the contrary, he refrains from being dogmatic. Nor are his conclusions always clear. His treatment, for instance, of *R. v. Buckmaster* (1887) 20 Q. B. D. 182 is far from lucid; and his terminology is not always that of the lawyer. The word 'pleaded', for example, cannot be treated as synonymous with 'argued'.

It is difficult to estimate the place this book will take. It may become the classic work on the subject. It deserves to do so, for it is packed with learning. Subsequent editions may achieve that position, but in order to do so they will have to inspire confidence in the practising lawyer. With this end in view, terminology must be watched, and doubtful conclusions eliminated.

E. G. M.

Industrial Assurance. An Historical and Critical Study. By Sir ARNOLD WILSON, M.P., and Professor HERMANN LEVY. Oxford: At the University Press. 1937. xxxiii and 519 pp. (21s.)

APART from the Reports of Government Commissions this bulky volume is the first comprehensive survey of industrial assurance from the social point of view that has been made available to the public.

Industrial assurance is a class of life insurance which is for the most

part taken up by wage-earning members of the community as a means of covering funeral expenses. In England and America, unlike most modern countries, this provision is supplied by societies and private companies working for profit. The magnitude of the sums involved is very great. In 1934 there were about 80 million industrial assurance policies in force in this country on the lives of some 30 million persons, and the annual premium income of the companies and societies concerned was £62,000,000. Furthermore, out of nearly 10 million policies issued in 1929, over 6 million were discontinued; in respect of $1\frac{1}{4}$ millions, free policies and surrender values were granted, leaving $4\frac{3}{4}$ millions as completely lapsed policies, or a ratio of 47.5 per cent. of lapses to new policies taken out. The authors say that there is no evidence to show that the lapse ratio has decreased since 1929—in 1935 the number of new policies issued was just under 11 millions. Finally, it may be mentioned that the average ratio of expenses to premiums collected was 34.5 per cent. in 1935; this compares with a ratio of 6.8 per cent. in the case of the State unemployment insurance scheme and 21.8 per cent. in the case of national health insurance (this last figure appears to be too high; another authoritative source puts it at not more than 16.5 per cent. for 1935).

This book is a weighty indictment of the present system of industrial assurance on three main grounds—the pressure put by and upon agents for the increase of business; the vast waste caused by lapses; and the very high expense ratio. There are other serious counts also which together make up a formidable list.

Sir Arnold Wilson and Professor Levy discuss the possible improvement which might result from further legislation to safeguard the public against abuses, but they come to the conclusion that both past experience and existing facts teach the lesson that legislation is powerless to correct the evils to which they have drawn attention. In support of this conclusion two independent statements may be quoted from their book. The first is taken from an insurance trade journal: 'Most of the defects found in industrial life assurance are inherent in the system'; and the second from the memorandum of the Industrial Assurance Commissioner, Sir George Robertson, K.C., to the Cohen Committee of 1931-33: 'I cannot propose any effective legislation to stop the issue of illegal policies.' Hence the authors' constructive proposal that the State should buy out the existing interests and should merge funeral benefit with national health insurance, as is the practice in most continental countries (in Germany since 1883).

Sir Arnold Wilson and Professor Levy have made out a very strong case, and in so doing have performed a valuable public service. It remains to find a government with the courage to tackle a vested interest which is so formidably entrenched both in finance and politics.

C. W. GUILLEBAUD.

Chitty's Treatise on the Law of Contracts. Nineteenth edition under the General Editorship of HAROLD POTTER, Ph.D., LL.B. London: Sweet & Maxwell, Ltd. 1937. ccxvi and 1031 pp. (50s.)

In this edition of this well-known text-book the work of preparation has been entrusted to Dr. Potter as general editor, and to seven other

collaborators who divide the twenty-five chapters between themselves. This method may in certain cases lead to some unevenness, but the present edition appears to have been so skilfully and carefully revised in all its parts, that it can be said that the value of this book has been increased to a most marked degree. The peculiar characteristic of Chitty is that its scope is wider than any other text-book on the law of contract and includes sections dealing with a large number of special contracts. This method has serious disadvantages in that it is impossible to deal adequately with such subjects as Carriage of Goods by Sea in eight pages and Carriage by Air in two. For instance, in this latter case no reference is made to the many difficult questions which arise as the result of *Grein v. Imperial Airways, Ltd.*; it would in any case be more convenient to insert the Law Reports reference to this case on p. 755. Or, again, to allot one short page to a discussion of the general principles governing the law of Bills of Exchange and Cheques and the subsequent fifty-five to setting out in full the whole of the Bills of Exchange Act, 1882, with short notes at the end of the sections seems hardly in place in a text-book of this nature. The more important sections might have been dealt with at greater length and some omissions made among the other sections where no comment is required. The treatment of the Sale of Goods Act on the other hand is excellent. The advantages, however, of a compendious treatise are great, because it serves as a quick method of discovering the relevant case-law on the rarer topics which arise in practice. The principles stated in Chitty are often too compressed to be valuable to the specialist, but to the practitioner who is dealing with an unfamiliar subject, its concise statements of principle and copious references to case-law are most welcome as showing how general principles have been applied in particular instances and guiding him directly to the most important decisions.

The index, which has been separately prepared, is better than usual in books of this type. The references to case and statute law appear to have been carefully done, but it hardly seems necessary where a case is cited in the actual text to enclose the reference to it in round brackets. Despite these minor criticisms this edition of Chitty is an excellent book and deserves a wide circulation. The new editors are one and all to be congratulated on the result of their co-operative treatment of the subject and the publishers for the form in which it has been produced.

P. H. D.

The British Year Book of International Law, 1937. Eighteenth year of issue. Humphrey Milford: Oxford University Press. vi and 282 pp. (16s.)

IF in a period of despondency there are those who think that public international law is rapidly becoming a section of history they may find some consolation in the continued progress of private international law. This is again illustrated in the British Year Book, the present number of which contains five articles covering eighty-seven pages on the former as against three articles covering sixty-four pages on the latter subject. Professor Hyde of Columbia University has provided a very instructive article on those decisions of the Supreme Court of the U.S.A., which

indicate an acknowledgment of a duty to ascertain and apply the principles of international law. Professor H. A. Smith, in discussing some problems presented by the civil war in Spain with particular reference to recognition of belligerency and to blockade is led to the conclusion that the law of nations being a law between independent States acknowledging no earthly superior must rest upon a moral and spiritual basis which itself presupposes a measure of agreement on fundamental principles. These principles are not specifically stated by the author, but whatever they may be he considers that they are being attacked and thus the foundations of international law, as at present understood, are in danger of destruction. Professor Smith thus regards the outlook as gloomy. To this it may perhaps be objected on the one hand that moral and spiritual values, being indeterminate and subjective things, must suffer change: they cannot escape the process of evolution. Secondly, it may be that we should look in another direction for the cause of the present disturbance of ideas. Great social and economic changes are occurring throughout the world and it is not certain that an international order based on the division of peoples into sovereign independent States with antagonistic interests can be much longer retained. Perhaps the sovereign independent State as hitherto defined has served its purpose and is moribund. The world must have an international law suitable to its needs—it will not adapt its needs to comply with a set of rules to be found in textbooks.

Other interesting topics of public international law discussed in this issue are the International Status of the Free City of Danzig by Dr. I. F. D. Morrow, and Custom as a Means of the Creation of International Law by M. Kopelmanas, while the provisions of the new treaty of alliance with Egypt are examined in relation to their historical background in an unsigned article of sixteen pages. The subjects of Private International Law which are treated are the Law of Domicil by Mr. J. H. C. Morris, The Influence of Huber's *de Conflictu Legum* on English Private International Law by Mr. Llewelyn Davies, and Proper Law and Illegality by Dr. F. A. Mann.

The obituary notices are unhappily numerous this year, containing the distinguished names of Elihu Root, Walther Schucking, Baron Edouard Rolin Jaquemyns and Dr. Mendelssohn-Bartholdy. There are, as usual, a large number of general notes, decisions of international and national tribunals and reviews.

J. W. C. T.

Clerk and Lindsell on the Law of Torts. Ninth edition. Under the General Editorship of HAROLD POTTER, Ph.D., LL.B. London: Sweet & Maxwell, Ltd. 1937. cxlii and 900 pp. (50s.)

It is almost half a century since the appearance of the first edition of *Clerk and Lindsell on Torts*, and in that period it has become one of the recognised works of reference on the subject. It was felt, however, that the time had come for a radical reorganization of the book, and this task was entrusted to the able hands of Dr. Potter. Taking '*Divide et impera*' for his motto, he summoned specialists in the Law of Tort to assist him in producing what may justly be called a Jubilee edition, and the results

of their collaboration are of the happiest. The whole work has been carefully revised and the part on Dangerous Property has been completely rewritten, while the torts of Negligence and Conspiracy are given chapters to themselves for the first time. We would like to suggest that in the next edition *M'Combie v. Davies* (1805) 6 East 538 should not be cited in the same footnote as *Union Credit Bank v. Mersey Docks & Harbour Board* [1899] 2 Q. B. 205 as though they were in complete agreement, and that the facts in *Rea v. Sherward* (1837) 2 M. & W. 424 should be stated more lucidly, for headnotes are not always to be relied on for clarity or accuracy. On p. 428 the relevant sub-section of the Law of Property Act, 1925, s. 149, is (2) and not (3), and a reference should be inserted to this citation in the Table of Statutes. In the chapter on Fraud, no mention is made of the problem arising in cases where a statement, false to the knowledge of the principal, is made by an agent who believes it to be true, though some of the authorities are mentioned, but not discussed, in the chapter on Parties. The chequered career of this part of the law, starting with *Cornfoot v. Fowke* (1840) 6 M. & W. 358 which is not cited, and going down to *Anglo-Scottish Sugar Beet Corporation v. Spalding U. D. C.* [1937] 2 K. B. 607, which was decided while this book was in the press, is both interesting and important. There are remarkably few clerical slips, considering the size of the book, but we cannot refrain from pointing out that *Pasley v. Freeman* is reported in the third volume of the *Term Reports*, and not of the *Times Law Reports*, and that the most recent edition of *Smith's Leading Cases* is the thirteenth, published in 1929 (p. ci). The index is exhaustive—it occupies eighty-four pages—and in the table of statutes the excellent practice of printing repealed Acts in italics is continued. We feel that *Clerk & Lindsell* can set out on its next fifty years with a new lease of life, thanks to the labours of Dr. Potter and his associates.

D. W. L.

Renvoi in Modern English Law. By the late ALBRECHT MENDELSSOHN-BARTHOLDY. Edited by G. C. CHESHIRE, D.C.L. Oxford: Clarendon Press and Humphrey Milford. 1937. xiv and 87 pp. (5s. net.)

No question in private international law has created greater difficulties or led to more controversy than the doctrine of *renvoi*. One particular aspect of the matter which has attracted much attention, not only in this country but also on the Continent, is whether the doctrine has ever been accepted by English law. In these circumstances the value of an examination by a continental lawyer of the three decisions of the English Courts on which the last-mentioned problem turns could not fail to be of very great value, and no justification is needed for the posthumous publication of this little book, which contains a summary of the conclusions arrived at by one of the most acute and penetrating minds which have brought distinction to German Legal Science. In brief his conclusions are these: that the English Courts since 1931 in applying the rules of conflict have consistently used exclusively English qualifications and tests to define the subject-matter and, secondly, that if foreign law is found to be applicable they have applied directly the substantive law of the foreign country

without regard to the doctrine of *renvoi*. The only decision which does not support this view is *Re Ross* [1930] 1 Ch. 377 which, in the learned author's opinion, is based on a misunderstanding of the weight of earlier authorities such as *Collier v. Rivaz* (1841) 2 Curt. 855.

There are reasons for saying that this is the view which was also held by Sir Frederick Pollock. Moreover it is that of Dr. Cheshire and probably of most of the small circle of English private international lawyers. There are several objections to the doctrine of *renvoi*, not the least of which is the fact that it so often places an English judge in the unenviable position of having to decide between the rival opinions of foreign lawyers as to the extent to which the doctrine enters into another system of law. The situation at present is somewhat obscure and the remedy may lie either in an authoritative pronouncement by the House of Lords, to whom the question is still an open one, or in some form of legislation. But in the meantime English lawyers will follow with interest the experience derived from the working of the rule laid down in sections 7 and 8 of the American Restatement of Conflict which, with two exceptions, negatives the application of the doctrine. This little book, in addition to its intrinsic merits, will also make an appeal to English lawyers because it contains a short but eloquent biographical memoir by Dr. Magdalene Schoch of one to whom 'law and justice were the foundations of international life'.

H. C. G.

Law of Property in Land. By H. GIBSON RIVINGTON, M.A. (Oxon), Scott Scholar, Clement's Inn, Daniel Reardon and John Mackrell Prizeman, 1900. Second edition. London: 'Law Notes' Publishing Offices. 1937. xxiv and 547 pp. (21s.)

PRACTITIONERS, lecturers and students owe a deep debt of gratitude to Mr. Rivington and his colleagues for their expert guidance in the maze of Property Legislation since 1922. This new edition, like all their publications, is a methodical, clear and accurate statement of the law, thoroughly revised and rewritten where experience proved it inadequate. Of the new matter incorporated, we have seventy odd cases and thirteen statutes; nothing seems to have escaped the watchful eye of the author.

The effect of copyhold enfranchisement is largely rewritten at pp. 19-25, and the operation of section 130 (2) L. P. A. is now reconsidered with a reference to Mr. Bailey's learned article in VI C. L. J. 67. We respectfully agree with the view now expressed at p. 132 on sections 14 and 199 L. P. A., and sections 10 and 13 L. C. A. There is a crop of new cases on restrictive covenants. *Re Ecclesiastical Commissioners* 1936, which appears at p. 374, might also be noted in this section. (Unfortunately cases of grave importance on restrictive covenants have been decided since the book appeared.) Easements account for several new cases, and pp. 227-9 on the Rights of Way Act 1932 are new. Equitable conversion under the statutory trusts for sale pp. 260-2 is new. At p. 291 we are now given the only real advantage of an attornment clause in a mortgage. A new section is given at p. 370 regarding endorsements on probate or letters of administration. Through-

out the book there are useful practical hints, *e.g.* pp. 74, 82, 340-1. On some matters we would have liked a fuller treatment and the benefit of Mr. Rivington's views, *e.g.* pp. 220-4—the difference between the periods of twenty and forty years under the Prescription Act and the difficulties connected with disabilities. We hesitate to make suggestions, but the following occur: p. 69 (*a*), reference to *Re Hanson* 1928 on section 32 L. P. A.; p. 134 (*k*), unless it is a registered restrictive covenant affecting the freehold; p. 137 (*v*) *Flexman v. Corbett* 1930; p. 213 (*x*) *cf. Fishenden v. Higgs & Hill* 1935; p. 230 (*g*) *Moore v. Rawson* 1824. At p. 267 line 7 from bottom, for *estate*, read *interest*; p. 352 (*v*) *Re Orlebar*, 3 Ch. should be Ch. But these are small points, and we congratulate and thank Mr. Rivington for his excellent book.

T. E. L.

The Factories Act, 1937. By H. SAMUELS, M.A., Barrister-at-Law. London: Stevens & Sons, Ltd. xii and 584 pp. (30s.)

THE Factories Act, 1937, is much more than a consolidating Act and therefore lawyers as well as persons responsible for factories—the Act gives the term 'factories' a new meaning—must study the subject afresh. Several books have already been published which will assist their studies although it appears that Mr. Samuels' work was the first.

As the Act does not come into force until July 1, 1938, the author cannot deal with the results of the Act. He can, however, as Mr. Samuels has done, set out the sections of the Act and comment on them in the light of the decisions under the 1901 Act. He has also set out, without annotations, the Employment of Women and Young Persons Act, 1936, and the Regulations for Dangerous Trades and certain other Orders at present in force. It is useful to find these bound together with the new Act, but it must be remembered that these Regulations will probably be altered when the new Act comes into operation.

Proceedings under Factory Acts often turn upon questions of fact—the Acts provide that certain parts of machinery 'shall be securely fenced' or that 'every dangerous part' shall be treated in a particular way—and therefore the practitioner hopes that his text-book will include a number of decisions as to what has or has not been held 'securely fenced' or 'a dangerous part'. Mr. Samuels has supplied a good number of cases, but he has not included enough of the more recent ones. A book published in 1937 can, perhaps, not be expected to include such cases as *Murray v. Schwachmann, Ltd.*, which was only heard in 1937, but the decision on 'safe' in the case of *Soutter v. Steel Barrel Co.* in 1935 might well have been included, together with a few more cases on the meaning of 'dangerous parts' in the otherwise interesting note on p. 43.

It is only in this respect that we can make any complaint of Mr. Samuels' notes which are, on the whole, admirably done. The cross references constitute an excellent guide to the 160 sections of the Act and the various hints on procedure a welcome aid to the practitioner.

The index, although it does not cover all the contents of the Regulations and Orders which form an appendix, is a good one and the publishers' and printers' work is attractive as well as efficient.

P. H. D.

Peaceful Change. A Symposium edited by C. A. W. MANNING.
 London: Macmillan & Co. (5s.)

EIGHT distinguished members of the staff of the London School of Economics have contributed these essays on peaceful change as 'an international problem'. Professor Webster defines for his colleagues the nature of the problem and points out that it is essentially one of finding the moral or social equivalent of war. Professor Toynbee warns us that peaceful territorial changes have been rare in the past and that the problem is to-day more acute than ever owing to the damming up of the old channels of solution—migration, free trade, etc. The contribution of the economists Professor Robbins and Professor Gregory is negative. They dispose quickly of the argument that territorial expansion is necessary to obtain raw materials, and also of the contention that it is necessary for better investment or for migration. Imperialism, they tell us, is only advantageous if other States want to practise it. Mrs. Mair discusses colonial policy very shrewdly. 'Self-government does not mean responsible government; it means government by the authority which you have been brought up to respect.' On this ground she urges the maintenance of the present internal regime in Tanganyika whether it 'changes hands' or not. The psychological essay by Professor Mannheim is analytical rather than constructive. The most interesting essay, to the lawyer and particularly the international lawyer, is that by Professor Lauterpacht. It is pre-eminently a plea for intellectual honesty in these matters. He urges the dangers of demanding peaceful change without realizing that this change must, as international society now stands, be radical, and that in order to achieve such radical change we must create institutions with supra-national legislative authority. Even when this is done these institutions may in their operation have to face resistance far from peaceful. In a word, the problem of change is not specifically international; it is 'the fundamental question of any system of law'. Consistently with his belief in the essential similarity of all law, municipal and international, he leads us to his conclusions: Judicial law-making may do something but not much; for what is required is, not a corrective, but a revolution, carried through by responsible statesmen; Article 19 of the Covenant is so dilatory that war is a more attractive means of change. Peaceful change, he assures us, needs nothing less than an international legislature with coercive power. The analysis is ruthless, not perhaps conceding enough to the exigencies of the moment, but those who are tempted to consider such a super-State as Utopian should reflect whether it might not be to the interest of the Great Powers to sink their differences in a common attack on what Professor Lauterpacht calls 'the immoral doctrine of equality' and assume in common the mission which each of them has in the past appropriated to itself. But who, like Barkis, is willing?

J. MERVYN JONES.

A Summary of the Law of Torts. By Sir ARTHUR UNDERHILL, M.A., LL.D. Thirteenth edition. By RALPH SUTTON, M.A., of Lincoln's Inn, one of His Majesty's Counsel, Reader in Common Law to the Council of Legal Education. London: Butterworth & Co. (Publishers), Ltd. 1937. 8vo. lxxviii and 393 pp. (12s. 6d. net.)

THE new edition of this useful text-book is once more in the capable hands of Mr. Sutton. Many parts have been expanded or entirely re-written, and all the recent statutory amendments of the law have of course been included. In particular, interesting questions are suggested on the interpretation of the Law Reform (Married Women and Tortfeasors) Act, 1935 (pp. 42-3, 45-6). The order of treatment is considerably improved, and a welcome change is that names are now appended to the cases cited as illustrations. The type, too, has been changed for the better.

There are some minor imperfections. Article 4 (Volition and Intention) is not very illuminating; what is meant by 'active or passive volition'? The maxim that 'every person is presumed to intend the probable consequence of his acts', which is left without much explanation, fogs the distinction between intention and negligence. Although *Stanley v. Powell* seems to be approved at this place, it receives a very restricted interpretation at p. 59, n. (p). Then, on the law of public nuisance, the overworked term 'special damage' does not seem to be a very desirable synonym for 'particular damage' (p. 115). In stating the rule that a master cannot sue for an injury that causes the death of a servant (p. 281), it might have been said that he can sue for loss of services up to the moment of death.

Some cases might profitably be added. Preferable as *R. v. St. George* (p. 58) is to the cases that go the other way, these other cases should at least be mentioned (*Blake v. Barnard* (1840) 9 C. & P. 626; *R. v. James* (1844) 1 C. & K. 530). *Herring v. Boyle* (1834) 1 Cr. M. & R. 377 is an authority *contra* at p. 61, n. (c), and *Robinson v. Balmain Ferry Co.* [1910] A. C. 295 might be worth inserting at p. 61, n. (f). On the interrelation of the Law Reform Act, 1934, and Lord Campbell's Act, Lord Atkin's dictum in *Rose v. Ford* is cited (p. 209), but not Lord Wright's ([1937] A. C. at p. 852-3). *With v. O'Flanagan* [1936] 1 Ch. 640 should be added at p. 302, n. (h); and a treatment of fraud is now hardly complete without a reference to *London County Properties, Ltd. v. Berkeley Property Co.* [1936] 2 All E. R. 1039. Finally, the decision in the *Hollywood Silver Fox Farm Case*, which is cited in a footnote to the chapter on Nuisance, might also have received some attention under Article 5 (Malice).

G. L. W.

Legislative and Executive Powers in Australia. By W. ANSTEY WYNES, LL.D., of the South Australian Bar. Sydney: Law Book Company of Australasia, Ltd. 1936. xxviii and 396 pp. (£1 12s. 6d.)

READERS of the Law Reports are familiar with the constitutional battles which are waged between the Dominion of Canada and its

Provinces in the Judicial Committee of the Privy Council. The limitations which restrict appeals from the Commonwealth of Australia and its States when engaged in constitutional issues which are not confined to a single State prevent that same familiarity with the problems of federal government in Canada's sister dominion, though the recent case of *James v. The Commonwealth* affords an exception. Yet the High Court of Australia, no less than the Supreme Court of Canada, is constantly engaged in the task of interpreting in the light of modern conditions a constitution framed thirty-seven years ago, years which have seen greater changes in political thought than any other period of the history of the British Empire. Dr. Wynes succeeds the late Dr. Kerr as a commentator upon the Australian Constitutional system; he confines himself to the legislative and executive powers, except with regard to the rights of the Commonwealth and State *inter se* where he includes the judicial power. There are no less than forty-seven references to the famous *Engineers' Case*. He necessarily touches upon many matters of general interest, notably in Chapters IV and XIII (Imperial Relations and International Affairs). He is critical of the Statute of Westminster both on legal and political grounds and does not contemplate the adoption of its general operative provisions in the Commonwealth. The book is well documented; noticeable for its absence is the name of A. Berriedale Keith in the bibliography. No constitutional lawyer on this side of the world could afford to omit reference to such an authority and, indeed, Dr. Wynes has made use of his notes in the *Journal of Comparative Legislation*.

The book is a substantial work, the product of long study, and may be cordially recommended to students of Federalism.

E. C. S. W.

The Modern Law of Real Property. By G. C. CHESHIRE, D.C.L., All Souls Reader in English Law. Fourth edition. London: Butterworth & Co. (Publishers), Ltd. 1937. xlviii and 850 pp. (30s. net.)

DR. CHESHIRE'S work may now well claim recognition as the leading text-book on the post-1925 real property law and as taking the place which was held by *Williams on Real Property* for earlier generations of students. Each succeeding edition has been marked, not only by changes made necessary to bring the text in line with the existing state of the law, but also by improvements in the arrangement and treatment of particular topics, materially enhancing the value of the work as a clear and accurate exposition of the subject. The author tells us in his preface that 'the present edition represents a far more drastic revision of the book than has hitherto been attempted', and to those of us who are familiar with the last (third) edition, even a cursory examination of the present edition will show the claim to be amply justified.

Among a large number of other changes which will have the effect of facilitating the methodical study of the subject, the treatment of restrictive covenants in a separate section following on Easements and Profits will, we think, meet with universal approval, as also will the inclusion of the subject of Fixtures in dealing with the definition of Land. In re-writing the sections concerning some of the more important topics, particularly

those relating to the rule against perpetuities, the priority of mortgages under the present law, and restrictive covenants, Dr. Cheshire has made a further advance in the lucid exposition of matters of difficulty with which he has previously grappled with a large measure of success. The new edition will maintain and increase the high reputation the work already enjoys. In the preparation and printing of so extensive a work some errors must inevitably be overlooked; but we have been surprised at meeting so few in the course of its perusal. Only two appear to call for notice. On p. 785, *Bradley v. McTamney* should be *Bradley v. McAtamney*, and on p. 808 it seems that the italicized word '*before*' has been inserted by oversight for '*after*'.

D. T. O.

The Conflict of Criminal Laws. By EDWARD S. STIMSON, Assistant Professor of Law, Washington University. Chicago: The Foundation Press, Inc. 1936. 8vo. xi and 219 pp.

THE question of the exercise of criminal jurisdiction over foreigners is one which has received more attention on the Continent and in the United States than in England. It has been dealt with, in certain of its aspects, by the Harvard department for research in international law, but Professor Stimson's clearly written and compact monograph is, so far as the reviewer is aware, the most systematic attempt made hitherto by an Anglo-American lawyer to analyse the nature of criminal jurisdiction and to formulate the general principles on which it is based. The main problem is to discover the law to be applied in determining the legal consequences of an act done in one State but producing its effect another. This question has given rise to much conflict and uncertainty. There will be general agreement with the learned author's view that the law which governs should be that of the State in which the guilty person was present at the time of committing the act. A feature of this work which is of special interest to us is the comparative study which it contains of the rules of English and American law as to jurisdiction on the high seas. An omission for which it would, however, be unfair to blame the author is that of the kindred topic of jurisdiction in the air. This is a question which contains many thorny problems and was under discussion by the Institut de Droit International at the Luxemburg Session in August 1937. Professor Stimson's little book will be of value not only to international but also to criminal lawyers in England, who will find it a useful guide if they lose their way—as is often the case—in the jungle of statutes and case law which conceal the rules on which jurisdiction is based.

H. C. G.

The English Legal System. By G. R. Y. RADCLIFFE, D.C.L., and GEOFFREY CROSS, M.A. London: Butterworth & Co. (Publishers), Ltd. 1937. 428 pp. (16s.)

THE authors state in the Preface that their purpose in writing this work was to supply the need which has arisen of a book dealing with the

history of our legal institutions and the present organization of our Courts of law. This need has become more urgent owing to a change in the curriculum of certain law schools in recent years involving the substitution of the study of the development of our legal institutions for the somewhat threadbare constitutional history which formerly was an integral part of the first year course. The inclusion of the subject by the Law Society in the new scheme for their examinations further enhances the importance to students of a volume like the one under review which concentrates material, available hitherto only by delving into a number of books of considerable bulk and varied in character.

Although the authors purport to confine themselves to the history of legal institutions, they in fact proceed to deal with the evolution and present state of the whole of our machinery for the administration of justice. This introduces a human interest into their work which the mere history of institutions would not evoke. The arrangement and sequence of topics is excellent and their exposition scholarly and as simple as the refractory and technical nature of the subject-matter make possible. For instance, the account of the early development of the Common Law, in Chapter VI, is the clearest account of this matter within a short compass that we have met with.

In spite of the extent and intricate nature of much of the material, the work appears to us to be distinguished by great accuracy, although a few small errors have been passed by oversight. On p. 66, *Ashton v. Thornton* should, of course, be *Ashford v. Thornton*. The error is repeated in the Index. On p. 280 no mention is made of the merging of the Court of Exchequer Chamber and the Court of Appeal in Chancery in the Supreme Court of Judicature by the Judicature Acts, although this oversight is corrected by implication on the following page.

D. T. O.

The Private International Law of Succession in England, America and Germany. By WALTER BRESLAUER. London: Sweet & Maxwell. 1937. 8vo. xxviii and 339 pp. (£1 1s. net.)

It is not easy to deal with this book in a short notice because its structure is of a nature to present a difficult task to the reviewer. It follows the plan of such German institutional works as Cosack's treatise on the B. G. B. and sets out the German rules of conflict relating to Succession with statements of the corresponding rules of English and American law sandwiched in between and followed by illustrations intended to bring the comparative aspect into relief. In other words it is not a systematic comparison: in fact it could not be regarded as such since it omits French law and thus fails to give a complete picture of the law of succession as it is found in the western world. So much ground is covered that the work inevitably becomes somewhat superficial in places. This criticism applies more particularly to the summaries of American law, which are sometimes unconvincing and imperfectly documented. The best feature of the book is its exposition of German Private International Law which is certain to be of value to English practitioners who are confronted with such problems as arose, for instance, in *Re Askew*

[1930] 2 Ch. 259. In fact the writer knows of no other book in English which deals with such matters more lucidly or in such a practical spirit, and it is, perhaps, to be regretted that the author did not confine himself to expounding his own law for the benefit of English and American readers. He is evidently very familiar with it not only as it is based on theory but also as it functions in the German Courts. The book is full of detail and it is impossible to test the accuracy of the author's conclusions except in a somewhat perfunctory way. The English law seems to be set out, generally speaking, with accuracy, though the author sometimes states his conclusions as to the effect of the cases rather over confidently. This tendency is the lion which stalks in the path of foreign writers when dealing with English case law. There are a number of slips of the pen; e.g. at p. 36, lines 13 and 14, the words 'German' and 'American' seem to be transposed, and at p. 48, lines 2 and 3, the same fate appears to have overtaken the words 'English' and 'German'. Certain footnotes (e.g. No. 3 at p. 29) are rather puzzling. But, taken as a whole, this book is a very useful guide to those who seek for knowledge of the main principles of German law relating to the matter and of the attitude of the German judges.

H. C. G.

Slater's Mercantile Law. Tenth edition. By R. W. HOLLAND and R. H. CODE HOLLAND. London: Sir Isaac Pitman & Sons, Ltd. 1937. xlv and 652 pp. (7s. 6d.)

THIS is the fifth edition to appear in the last seven years. For a modest sum a student may get an account of commercial law, beginning with a general view of the law of contract, together with a summary of selected leading cases and an appendix giving the text of the Factors Act, 1889, and the Sale of Goods Act, 1893. The inclusion of legal topics in various examinations means that books must be produced for students who simply cannot find time to read more than one book on a subject. A sound grasp of legal principles is then practically unattainable, and available time and energy go into remembering much detail of the type that examiners may be expected to ask about. The task of the authors is, from the point of view of anything worthy of being called legal education, quite hopeless; if "improvements" were made so that reviewers in learned journals praised the work, then those for whom the book is written would no longer read it. Judged by what it is written for, the book is eminently successful, although criticism might be made on many minor points. The chief trouble lies not in wrong statements but in the necessity for compression, leading to passages that tend to produce wrong conclusions. The paragraph on *M'Alister v. Stevenson* (p. 242) is of this type, and at p. 293 much trouble to students might be saved if in relation to crossed cheques a distinction was made between paying and collecting banker. The selection of cases is not particularly good; for instance, *London Assurance Co. v. Mansel* is given (p. 577) in a form that suggests that a statement to an insurer must be material if the insurer is to be able to avoid the policy on the grounds of inaccuracy in the proposal even when the proposal is made the basis of the contract, although *Dawsons, Ltd. v. Bonnin* is cited in the text.

R. M. J.

A Digest of English Civil Law. By EDWARD JENKS (Editor), the late W. M. GELDART, Sir W. S. HOLDSWORTH, R. W. LEE, Sir J. C. MILES, and W. LATEY, assisted by E. HEARN, A. S. ORR, and H. G. HANBURY. Third edition. Two vols. London: Butterworth & Co. (Publishers), Ltd. 1937. ccxvii and 1258 pp. Index, 120 pp. (70s.)

It is a great pleasure to one who was a regular subscriber to the original edition of this work, when it appeared in eleven parts at various intervals between the years 1905 and 1916, and who is able from experience to testify to its accuracy, lucidity and general utility, to be able to welcome this new edition embodying the great changes in English law during the last twenty years. Some revision has, of course, been found necessary in every section, but the Property legislation of 1925 and succeeding years has involved the rewriting of the greater portions of the sections dealing with Property and Succession on Death. The authors have also, although purporting to state the law as at the end of 1936, been able to embody the provisions of the Matrimonial Causes Act, 1937, which involved considerable change in Book IV on Family Law. There has been no change of much importance in the sections dealing with Contract, Quasi-Contract and Tort, but the Digest indicates an important change of view on the subject of Negligence. This is now allotted a separate section and Dr. Jenks indicates in his Preface a disposition to adhere to the view maintained by the late Sir Frederick Pollock and Professor Winfield that it must be classed as a distinct head of Torts. 'In other words', he says, 'negligence is not only a state of mind; it may also be a breach of legal relationship.' It is a matter of great satisfaction to observe that, with one exception, after the lapse of so many years the distinguished authors of this useful work have again been able to take part in the revision thereof. It has the distinction, unusual for an English law book, to be the subject-matter of translations into both French and German. It should appeal to a large public, not necessarily restricted to lawyers, and, this being so, we regret that the publishers have found it necessary to fix so high a price for the volumes as it may prove prohibitive to many students who would desire to have them as a permanent addition to their library.

D. T. O.

Williams' Law and Practice in Bankruptcy. Fifteenth edition. By JOHN BASIL BLAGDEN, M.A., and JOHN MCLEAN BUCKLEY, M.A., both of the Inner Temple, Barristers-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1937. cli and 1096 pp. (£2 10s. net.)

SINCE the appearance of the last edition of this standard work on the law of bankruptcy (1932) the Law Reform (Married Women and Tortfeasors) Act, 1935, has removed the privileges against bankruptcy proceedings enjoyed by married women: in the present edition attention has been drawn to this important change in the law. The work has been so revised, furthermore, as to incorporate the changes made by the County Courts Act, 1934, which repealed and substantially re-enacted section 122

of the Bankruptcy Act, 1883, providing for the administration of small estates in the county court. As such an administration is rare in practice and no longer a proceeding in bankruptcy, the editors have omitted the old Rules and Forms from the present edition; and they have also eliminated the Mayor's Court Rules and Forms, which are now obsolete. They have, on the other hand, re-arranged and expanded the notes to the 'reputed ownership clause' (section 38 (2) (c)) and to section 42 (settlements). Largely in view of the important decisions of the Court of Appeal in *Re Andrew* [1937] Ch. 122, and of the House of Lords in *Peat v. Gresham Trust, Ltd.* [1934] A. C. 252, the editors have, moreover, almost wholly re-written the notes to sections 40 and 41 (executions) and 44 (avoidance of certain preferences). Apart from these substantive changes, the new edition brings the cases, statutes, and other legal sources of the law of bankruptcy up to September 30, 1936. The general character of the work, which has proved to be indispensable to the profession and to advanced students of this branch of our law, has been preserved. The opinions of the editors on points of law as yet undecided will be of much assistance to practitioners. Although Mr. Stable is no longer associated with the work as an editor, it is satisfactory to learn that he has given valuable advice and assistance to the present learned editors, Mr. Blagden and Mr. Buckley.

H. D. H.

Jurisprudence. By Sir JOHN SALMOND. Ninth edition. By J. L. PARKER, M.A., Barrister-at-Law, Fellow of Worcester College, Oxford. London: Sweet & Maxwell, Ltd. 1937. xx and 753 pp. (25s. net.)

MR. PARKER has accomplished a difficult task in a most competent and thorough manner, but his super-conscientiousness has led him to adopt a method of editing which, for the student, will make Salmond's work much more difficult to comprehend than it would be if Salmond's text had been left unchanged in the form in which the author himself left it in the seventh edition and all suggested alterations, additions and criticisms by the editor reserved for Appendices either at the end of each chapter or at the end of the book or in footnotes. As it is, the student is confused by brackets interspersed throughout the text, notes by the editor breaking up the continuity of reading and a mixture of footnotes by both the editor and the author.

For the material contributions made by the editor to the new edition we have little but praise. Too much attention is perhaps given to the philosophical aspects of the subject, tending to obscure what, after all, is the important consideration for lawyers, the analytical and historical examination of legal conceptions and principles. All the Excursus are contributions of value and will be welcome to students and teachers alike, particularly Excursus E and F which deal with matters which have been the subjects of much debate and controversy.

It is a small matter, but one which needs attention, that the same care which has been devoted to the writing of the new edition does not appear to have been extended to the proof-reading. For instance, Stammler's *Lehrbuch* is cited differently, and erroneously, in three places, and there are several other oversights of that nature.

D. T. O.

A Handbook of Public International Law. By T. J. LAWRENCE.
Eleventh edition by Professor P. H. WINFIELD. London:
Macmillan & Co., Ltd. 1938. xvi and 207 pp. (3s. 6d.)

THIS little book was primarily intended for 'students unable to obtain oral information, and men of action with little taste for legal subtleties and little time for minute investigation'. For the second of these classes this edition provides as useful a survey as the limited space will allow, though it may be objected that even in a book of this size the League of Nations deserves more than a page and a half tucked away in a chapter on the 'Non-Hostile Intercourse of Belligerents, and Peace'.

For the student, Parts I, III and IV, Introduction, Belligerency and Neutrality, remain useful, but Part II, The Law of Peace, is no substitute for Professor Brierly's 'Law of Nations'. No editing could ever make it that. Lawrence belongs to an age when international law might have been, not too unjustly, described as largely a matter of opinion, and Lawrence cites hardly a case. To-day, rightly or wrongly, the student is faced with an attempt to elaborate the rules of international law from the decisions of national and international tribunals, and a work which is not ample enough to deal with the more important cases will afford him little help in examinations.

B. E. K.

The Australian and New Zealand Society of International Law.
Proceedings, Vol. I. Melbourne University Press, in association with Oxford University Press. 1935. xxvi and 188 pp. (10s. 6d.)

THE Australian and New Zealand Society of International Law was founded at Sydney in 1933 with Professor A. H. Charteris as its President. This volume contains the papers and addresses delivered at its first conference in the same year. It reveals the interest awakening in Australia in her new international status, and in the special legal problems which that involves. Sir John Latham contributes a paper on 'Some Recent International Problems', but other papers are more definitely national in their interest—'Separate Action by the British Dominions in Foreign Affairs', by Sir W. Harrison Moore; 'The British Dominions as Mandatories', by the Hon. Mr. Justice Evatt; 'The Position of Consuls in Australia', by the President, Professor Charteris; 'The Italian Consular Incidents in North Queensland', by Dr. Fry; 'Australia and the International Labour Conventions', by Professor Bailey; 'The Statutory Basis of Extradition in Australia', by G. B. Castieau.

The Society is to be congratulated on its first enterprise and on a valuable contribution to the special literature of International Law. It is appropriate that its first meeting was held in the University of Sydney, to whose first Professor of Law, Pitt Cobbett, all students of International Law have been so much indebted.

B. E. K.

International Law. By K. R. R. SASTRY, M.A., M.L., Reader, Law Department, Allahabad University. Allahabad: Law Journal Press. 1937. xxxi and 472 pp. (7s. 6d.)

THIS is an attempt to provide a text-book for students in India, where recent events have stimulated an interest in international law. India was an 'original member' of the League of Nations, but the inauguration of the Indian Federal Court in October, 1937, has given a new and special stimulus to the problems of inter-State relationships. International Law has been instituted as a regular subject for the degree of LL.B. in the Allahabad University. In these circumstances there was obviously room for a new text-book of moderate length which should reproduce fairly the views of orthodox western international lawyers, give some account of international law concepts in Indian history, and place a certain emphasis on the decisions of the Supreme Court of the United States in inter-State disputes. Mr. Sastry's book successfully fulfils these requirements, but his modesty in relying on the opinions of other writers is carried a little too far. It would be an improvement if the author were to state his own views more positively in future editions and make rather more use of footnotes.

B. E. K.

Ridges' Constitutional Law of England. Sixth edition. By PROFESSOR A. BERRIEDALE KEITH. London: Stevens & Sons, Ltd. 1937. 1 and 642 pp. (21s.)

PROFESSOR KEITH has brought the present edition up to date with his usual ability and has included in the text accounts of things so recent as the Constitution of Eire and the Ministers of the Crown Act. The information with which this work is full is, however, sometimes of a kind which is unexpected in a book on Constitutional Law; for example, we are told on p. 319 the numbers of the British Army in 1914 and 1937 and the amount of the Army estimates for 1936-37 and 1937-38. Though in the Bar Examination Constitutional Law and Legal History are combined in one paper, this is an inadequate excuse for devoting a hundred pages to an account of the Judiciary which is almost purely historical, while Judicial Control of Public Authorities and Delegated Legislation receive only three pages each. The Report on Ministers' Powers is treated very cursorily and is not even mentioned in the index. The introductory chapters are based almost exclusively on Dicey and no indication is given that his views have been subjected to penetrating criticism, for instance by Dr. Jennings in 'The Law and the Constitution'. We feel that in the next edition there should be a readjustment of treatment in order to give effect to the view expressed by Professor Keith himself in the introduction, where he says: 'The classical doctrine of the rule of law must now be modified, and due recognition accorded to administrative law as an essential part of constitutional law.'

D. W. L.

Constitutional Laws of the British Empire. By W. Ivor JENNINGS and the late C. M. YOUNG. Oxford: At the Clarendon Press. 1938. xviii and 364 pp. (18s.)

DR. JENNINGS, with the collaboration of the late Miss C. M. Young, has produced a case-book on the lines of *Keir and Lawson*, but as the materials for a study of Dominion Constitutional Law are so difficult of access, his book is even more valuable than its prototype. The cases have been selected and edited with great skill and all the more important sections of the Dominion Constitutions are to be found in the appendix. Readers of the *Annual Survey of English Law*, 1935, who, like the learned editor of the *Law Quarterly Review*, thought the summary of the Government of India Act by Dr. Jennings 'a model of compression', will have further opportunities of benefiting by his ability to say *multum in parvo* when they come to study the chapters in the present book which introduce each section. The recent promulgation of the Constitution of Eire compelled him to leave out most of his material on the Irish Free State without giving him time to say anything about the new instrument. Perhaps he can be persuaded to give us his views in a supplement to be published in the near future. Dr. Jennings has once more placed teachers of Constitutional Law in his debt, and it does not need the gift of prophecy to foretell that his latest work will immediately become a standard text-book.

D. W. L.

An Autobiographical Sketch by John Marshall. Edited by JOHN STOKES ADAMS. University of Michigan Press. 1937. xxiii and 48 pp. (\$2.)

THIS autobiographical sketch, written at the request of Joseph Story, is a welcome addition to our knowledge of the early life of Marshall. We catch glimpses of him as an undergraduate, attending lectures on philosophy in the intervals of campaigning against the British, as a member of the Virginian and National Legislatures who wholeheartedly espoused the cause of the Federal Constitution, and, above all, as a lawyer devoted to his profession. His description of contemporary affairs brings out vividly the widespread hostility to the adoption of the Constitution, the great dislike of Genet's activities, the unfavourable reception given to the Jay Treaty, and the circumstances of his own appointment to the position of Chief Justice of the United States. Here, unfortunately, the account stops short, but not before Marshall has reminded Story of 'the necessity in some instances of controuling the letter by the plain spirit of the law'. This is the attitude which was to make his presidency of the Supreme Court so fruitful, the attitude so admirably expressed in his own words, 'It is a Constitution we are expounding.'

D. W. L.

State House versus Pent House. By Professor ZECHARIAH CHAFEE. Providence, R.I.: The Booke Shop. 1937. xxii and 165 pp. (\$1.)

THOSE who have read Professor Chafee's book on the Mooney case will remember how impartially he states the facts of that embittered controversy and how skilfully he explains the legal issues involved. He is equally impartial and skilful in the present work which deals with the dispute between Governor Quinn of Rhode Island and Walter O'Hara of the Naragansett Race Course. This dispute is of interest to English lawyers because it raises questions which are of vital importance in this country, such as the control of administrative bodies by common law Courts and the responsibility of the military for acts done under a proclamation of martial law. It is a far cry from Providence, R.I., to Cambridge, England, but, as Professor Frankfurter has reminded us, 'many of the basic conceptions of the public law of England and of the United States are rooted in the same historic soil'.

D. W. L.

The Interpretation of Statutes. By the late Sir PETER BENSON MAXWELL. Eighth edition by Sir GILBERT H. B. JACKSON, late Puisne Judge of the High Court at Madras. London: Sweet & Maxwell, Ltd. 1937. cxii and 381 pp. (£1 12s. net.)

As the learned editor says, Maxwell's book is too firmly founded upon lasting principles to require substantial alteration, and he has found the number of additions requisite in the eighth edition 'quite incommensurate with the amount of reading that the revision has entailed'. Hence the increase is only a matter of nine pages. We have used Maxwell pretty frequently and this edition appears to be as reliable as any that has preceded it within our memory. Sir Gilbert regards it as a work to be read as a whole, rather than as a manual of ready reference. That is a matter on which opinions may differ and we doubt whether a judge who knew any book on interpretation (be it of statutes or of other legal documents) from end to end would do any better than one who knew a few leading rules and applied them with common sense.

P. H. W.

Modern Administration of Probate Practice and Law. By A. V. RISDON, Solicitor, Honours and Cook's Law Prizeman, assisted by PERCIVAL HANCOCK, Solicitor, Honours. London: Sir Isaac Pitman & Sons, Ltd. 1937. xlix and 657 pp. (£3 3s. net.)

THIS somewhat bulky volume is intended for 'all engaged in winding up estates, drafting wills, and handling trust and investment matters'. One gathers from the introduction that its primary object is to facilitate

and expedite this branch of the work in a solicitor's office, and so to repel the menace of competition from banks and other like institutions. The book comprises twelve parts: it begins with an account of the questions which should be asked when taking instructions for preparing a client's will, and, finally, after covering such diverse topics as the drafting of the will, death duties, office routine and correspondence, winding up the estate, and investments, fittingly concludes with a disquisition on costs. As each practical hint is given, the underlying legal rule is adequately explained; and the authors' enthusiasm for their subject and for efficiency in its administration is both stimulating and infectious. A brief perusal of the book leads one to anticipate that a warm welcome awaits it from solicitors and articulated clerks alike.

S. J. B.

Select Cases on Commercial Contracts. By A. CECIL CAPORN, B.A., LL.B., of the Middle Temple, Barrister-at-Law; formerly Lecturer on Common Law at the University of Sheffield. London: Stevens & Sons, Ltd. 1937. xviii and 395 pp. (12s. 6d. net.)

THIS is a handy case-book for students of Commercial Law. It is published in a clear and attractive form, and follows the well-known lines of *Caporn's Selected Cases on Contracts*. Under concise propositions of law approximately one hundred leading cases are given, each with a summary of its facts and generous extracts from the judgments; and the full notes which follow many of them summarize the facts and decisions of many additional cases. The topics thus treated are Agency, Negotiable Instruments, Sale of Goods, Bills of Sale, Carriage, Insurance, and Guarantee and Suretyship. Mr. Caporn's case-books, as many have reason to know, are a boon not to be missed; and, although candidates for the Special Examination in Commercial Law at Cambridge would, no doubt, prefer some cases on Partnership and Companies in lieu of those on Bills of Sale, this is a book which may be studied with advantage by any student of English law.

S. J. B.

Death Duties and Probate Practice. By S. C. HOUGH, Certificated Associate of the Institute of Bankers; Lecturer on Death Duties and Probate Practice at the Hammersmith Commercial Institute and the City of London College. London: Sir Isaac Pitman & Sons, Ltd. 1937. xv and 207 pp. (7s. 6d. net.)

THIS little book, bearing a foreword by a past president of the Institute of Bankers, is a sign of the increasing interest which banks and insurance offices are taking in trusts and administration. Though intended for students with little or no knowledge of law, an attempt is made by way of introduction to outline the law of trusts, wills and settlements in four short pages. The bulk of the text consists of twenty

pages on Probate Practice, 128 pages on Death Duties, and appendices. No doubt, as the foreword predicts, it will prove useful to those for whom it is intended.

S. J. B.

Cases on International Law. Vol. II, War and Neutrality. By PITT COBBETT, M.A., D.C.L. Fifth edition by W. L. WALKER, M.A., LL.B., of Emmanuel College, Cambridge, and of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. xxxix and 598 pp. (25s.)

'PITT COBBETT' began some fifty years ago as a case-book with notes, but by its fourth edition it had very nearly become a text-book with cases. The present editor would have liked to revert to the original idea, but felt himself bound to keep to the standard set by the editor of Vol. I of the fifth edition. He has succeeded, however, in reducing the size of the volume by nearly a hundred pages, while adding a number of cases and an introductory account of the legality of war as a means of settling international disputes. There has also been a considerable improvement in general arrangement.

It may be felt, however, that certain recent tendencies might have received more attention. The effect on the general law of neutrality of recent treaties and instruments might have received ampler treatment, and one is surprised to find no mention of the recent neutrality legislation of the United States in the section on National Neutrality Laws, or of the doctrine of non-recognition in the section on Title by Conquest. Co-operation between printer and editor has not been very happy, and in the shortened account of the important case of *The Zamora* the injudicious employment of inverted commas has made it exceedingly difficult to tell when transition from narrative to quotation, and *vice versa*, takes place.

B. E. K.

Wharton's Law Lexicon, forming an Epitome of the Laws of England under Statute and Case Law, and containing Explanations of Technical Terms and Phrases ancient, modern and commercial, with selected titles relating to the Civil, Scots, and Indian Law. Fourteenth edition. By A. S. OPPÉ, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1938. viii and 1081 pp. (£2 10s.)

WHARTON is now too well established to require any further recommendation. Since the last edition in 1925 there have been tremendous changes in the law of property, and there has been a rapid development in tort and in other branches of law. These facts make quite clear the arduous task of the present editor. These developments and the amplification of

old titles have involved an addition of one hundred and sixty pages. A few of us here have spent an interesting and instructive period in suggesting various legal terms, and checking them up in this great work and seldom have we failed to glean fresh information or been disappointed. Recent cases and statutes are incorporated, e.g. *British Russian Gazette, Ltd. v. Associated Newspapers, Ltd.*, under Accord; *Rose v. Ford* under Law Reform; *Fender v. Mildmay* under Marriage, Promise of; Ministers of the Crown Act under Prime Minister; Factories Act. Under Abdication 1 Edw. 3, c. 4, should read c. 3. Under *Volenti non fit injuria* we duly note a reference to Professor Goodhart in the *Cambridge Law Journal*, 1934, Vol. V, p. 192. A reference to *Swadling v. Cooper* might have been added under Contributory Negligence; the Cabinet probably deserves a fuller treatment, and the right of Angary should be noted. These are but small points at random, and we congratulate the editor on the thoroughness of his revision, we appreciate the immense labour involved, and thank him for making *Wharton* more useful than ever.

T. E. L.

A Concise Law Dictionary for Students and Practitioners. Second edition. By P. G. OSBORN, LL.B., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. vii and 358 pp. (15s.)

THE first edition appeared in 1927, and substantial changes have been made in the second edition. The modern law is stressed, many new titles are added and old ones amended as the result of changes in statute and case law. Notwithstanding the wise omission of the former summaries of cases, the book has been extended by fifty pages.

The virtue of this dictionary is in the word 'concise' although it covers practically the whole field, dealing with English and Roman Law terms, Latin maxims and abbreviations. There is an appendix of reports and a table of regnal years. At p. 143 under 'Goods', reference might be made to the Sale of Goods Act, 1893, s. 62 (1). At p. 243—'previous decisions of a Court itself are authoritative precedents'—this only applies strictly to the House of Lords and the Court of Appeal. These are but small points. The student will find it an accurate and an extremely convenient reference book.

T. E. L.

Annual Survey of English Law, 1936. Published for the London School of Economics and Political Science (University of London) Department of Law by Sweet & Maxwell, Ltd. London. 1937. xl and 431 pp. (10s. 6d.)

Of the usefulness of the *Annual Survey* there can be no question; it should be on the shelves of all persons in this and in every other country who are interested in the development of English law. Every title tried is an accurate summary of the legislation, case law and legal literature of 1936. The epitomes of cases are models of conciseness and clarity, and the comments and observations deserve thoughtful

consideration. This number has an additional Table of Statutory Rules and Orders, and seventy more pages than its predecessor. Constitutional Law and Administrative Law occupy sixty pages, and here we note the Civil List Act, Declaration of Abdication Act and several Consolidating Acts—Housing, Public Health, National Health Insurance—and cases on 'natural justice' in the wake of *Errington v. Minister of Health*. Property and Conveyancing take thirty pages, with important cases on perpetuities, restrictive covenants and copyright. Contract involves about twenty pages, and the notes on the frustration cases are particularly good. Tort takes fifty pages, the main topics being nuisance, negligence, *Rylands v. Fletcher* and defamation. Mercantile Law had a 'quiet year', but covers forty-five pages. In Industrial Law, stress is laid on the *Commissioners of Inland Revenue v. Duke of Westminster*, and in Criminal Law on the cases dealing with *autrefois convict*. It was a good year for legal literature in every department.

T. E. L.

Principles of the Common Law. Fourth edition. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn and the Western Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. lxvi and 932 pp. (30s.)

THIS work was originally based upon *Indermaur's Common Law* first published in 1876 which ran to twelve editions. It was rewritten and enlarged in 1922 by the present editor and this is the fourth edition for which he is responsible. The sections on landlord and tenant, patents, copyrights and trade marks have wisely been omitted. Further, there are two great improvements. First the mass of former footnotes is now rightly transferred to the text, the facts of the principal cases are set out, and the work is broken up into convenient paragraphs. The second improvement is that the work is divided into four parts. Part I deals with Contracts; Part II, Torts; Part III, Particular Contracts—agency, carriage, sale of goods, suretyship; and Part IV gives an outline of the law of evidence. The book has been thoroughly revised, every page bears evidence of this, and there are about ninety additional pages. All the recent cases of importance are incorporated; six which came too late for the text appear at pp. lxv—lxvi. Unfortunately the decisions of the House of Lords in *Rose v. Ford* and *Fender v. Mildmay* were only reported after *Wilshire* was published. We congratulate the editor on the thoroughness of his revision and rewriting; the new edition will be even more popular than its predecessors.

T. E. L.

A B C of County Court Practice. By CEDRIC H. AKASTER, Solicitor of the Supreme Court, assisted by F. W. BROADGATE. London: Sir Isaac Pitman & Sons, Ltd. 1937. xvii and 362 pp. (12s. 6d.)

THE bringing into force of the County Courts Act, 1934, and the County Courts Rules, 1936, which together entirely revised the procedure

in the county courts, has provided an opportunity for the introduction of a new work on practice, and this opportunity has been admirably taken by the authors of this book.

The practitioner will find in this book all relevant sections of the County Courts Act, 1934, and the Rules of 1936 in their entirety arranged under headings in alphabetical order with numerous cross references. The appendices include the Scales of Costs, Fees Order, and a table of enactments conferring jurisdiction on the county courts. It is true to say that practically every session of Parliament finds measures that extend the jurisdiction of the county courts reaching the statute book and there are few solicitors who can afford to be without an authority on procedure. The A B C besides providing this authority in convenient form deals exhaustively with its subject and gives at a glance the relevant section of the Act or Rules. Procedure under the Workmen's Compensation Acts is not included and, indeed, it would not be possible to deal adequately with this subject and still confine the book to anything like its present handy size. It is not written for the layman but will, I think, take its place with the Practices as a work of great value to the solicitor practising in these Courts. If it meets with the success it deserves, it should be revised annually for upon this its value depends.

J. D. M.

The Law of Succession, Testate and Intestate, including the Administration of Assets and the Liability of Personal Representatives for Death Duties. By D. HUGHES PARRY, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Professor of English Law in the University of London. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. xlvii and 311 pp. (15s. net.)

THIS is a book of many merits. It is concise, accurate and well documented; and, as was to be expected, its pages show that the learned author has the authorities at his finger-tips. Designed primarily for the use of candidates for the London LL.B. and the Solicitors' Final Examinations, it assumes a general knowledge of the Law of Property, and does not hesitate to approach the more advanced and technical aspects of the subject.

In reducing to this modest compass a subject which is responsible for volumes as bulky as *Jarman*, *Williams on Executors*, and *Theobald*, the learned author has earned the gratitude of his readers. What portions of the more technical topics (such as Construction, and Death Duties) merit inclusion in a relatively small text-book is necessarily a question of some delicacy; but the very concise method of treatment here adopted has reduced this problem considerably. At times, perhaps, one feels that the student might welcome some further explanation of a difficult point, or even a warning that a difficulty exists; yet there is no doubt that this is a valuable addition to the existing text-books, and one which will be widely used.

S. J. B.

Palmer's Company Precedents. Part II, Winding-Up Forms and Practice. Fifteenth edition. By ALFRED F. TOPHAM, LL.M., Benchet of Lincoln's Inn, one of His Majesty's Counsel, and A. M. R. TOPHAM, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1937. cxlix and 1415 pp. (£3 3s. net.)

A NEW edition of the winding-up volume of Palmer would in any case be welcomed by practitioners; but the value of this edition is especially enhanced by the re-arrangement of the section dealing with Voluntary Winding-up. The editors, recognizing that voluntary liquidation is at least as important as winding-up by the Court, have now arranged this section logically and clearly and have abandoned the practice of making it subordinate to the section relating to compulsory liquidation.

In other respects there appears to be little change in the new edition apart, of course, from the addition of references to recent decisions and to amendments of the rules. These additions appear to have been made with care; though it is somewhat strange that the volume appears still to contain no reference to the decision in *In re Health Promotion, Ltd.* [1932] 1 Ch. 65.

It is suggested that a table of statutes cited would be a useful addition to the volume.

B. F. M.

Palmer's Company Precedents. Part I, General Forms. Fifteenth edition. By ALFRED F. TOPHAM, LL.M., Benchet of Lincoln's Inn, one of His Majesty's Counsel, and A. M. R. TOPHAM, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. clvi and 1632 pp. (£3 15s. net.)

IT is, no doubt, a tribute both to the draftsman of the Companies Act, 1929, and to the editors of the fourteenth edition of this volume that few changes have had to be made in the latest edition. Some useful new notes have been added with respect to stamp duties and on the questions which have been troubling practitioners in connection with redeemable preference shares; and the part of the volume dealing with the reduction of capital also includes some new forms and notes. References to statutes passed and cases decided since the fourteenth edition was published appear to have been made with care; and many of them are not bare references to the statutes and cases, but comprise short notes. The apparent lack of any mention in the Index of the National Defence Contribution, which is specifically mentioned in the Preface, causes some doubt, however, as to the completeness of the Index.

B. F. M.

Prideaux's Forms and Precedents in Conveyancing (incorporating *Wolstenholme's Forms and Precedents*). Twenty-third edition. By R. M. C. MUNRO and Sir L. H. ELPHINSTONE, both of Lincoln's Inn, Barristers-at-Law. Three volumes. London: Stevens & Sons, Ltd. 1936-7. (£6 6s. net.)

THE twenty-third edition of this valuable work has now been completed by the appearance of the third volume. The principal topics dealt with in it are settlements, wills and charities, and 587 out of the 1,003 pages of text deal with settlements.

The volume contains over 150 pages of explanatory text, called on the title page dissertations. 106 of these are given to a note on the law and practice relating to trusts and settlements, especially marriage settlements; 10 to appointments under powers; 10 to trust instruments; 8 to vesting instruments (entirely new matter); 8 to the appointment of new trustees; 84 to wills; 9 to administration instruments and assents; and 21 to charities. The note on the latter subject has been entirely rewritten and contains an exposition of the difficult subject of mixed charities. The object of the work is of course to serve as one of the tools of the practitioner's trade, but, apart from this, the dissertations will be found by teachers and students, especially students reading for the solicitors' final and honours examinations, a helpful supplement to the text-books on conveyancing.

H. A. H.

Fay's Leading Cases in a Nutshell. Second edition. By E. STEWART FAY, M.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. viii and 163 pp. (4s. 6d.)

THIS is a handy collection of some two hundred and fifty leading cases—Constitutional Law (30), Criminal Law (36), Tort (45), Contract (38), Evidence (28), Real Property (24), Equity (50) and about thirty others are dealt with in the notes. There are a few cases for 1937, notably the decision of the House of Lords in *Rose v. Ford*. A judicious selection has been made, and the facts and decisions are well set out. It should prove very useful for revision.

A Dictionary of Medico-Legal Terms. By ALBERT CREW, of the Central Criminal Court, Barrister-at-Law, Vice-President of the Medico-Legal Society of London, Recorder of Sandwich, and K. W. AYLWIN GIBSON, M.R.C.S.(Eng.), L.R.C.P.(Lond.), Member of the Council of the Medico-Legal Society of London. London: Sir Isaac Pitman & Sons, Ltd. 1937. viii and 80 pp. (5s.)

THIS book is intended for criminal lawyers, police officers, jurors and medical witnesses. Technical terms are explained in clear and

simple language with guidance as to the proper pronunciation. When the lawyer and the doctor combine a good result is bound to follow, and doubtless this little book will prove extremely useful to all who have to deal with the administration of the criminal law and the law of workmen's compensation.

Hints for Young Solicitors and Articled Clerks. By Sir J. ROGER B. GREGORY, Past President of the Law Society, and M. F. TWEEDIE, Solicitor. Revised edition by L. J. D. BUNKER, LL.B., Solicitor, Director of Legal Studies to the Sussex Board of Legal Studies. London: Butterworth & Co. (Publishers), Ltd. 1938. viii and 56 pp.

THIS book contains useful suggestions on points of general discretion and practice—how and what to do (or not to do) next. It deals with Executorships and Administration, Conveyancing, Litigation, Advocacy, Criminal Law, Divorce and Matrimonial Disputes, Companies, Costs, Office Organisation and Relations with Other Professions. With this at hand the beginner will evade many pitfalls.

Introduction to the Principles of Land Registration. By Sir JOHN STEWART STEWART-WALLACE, C.B., Chief Land Registrar of H.M. Land Registry for England and Wales, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1937. viii and 93 pp. (5s.)

THIS book is based on a series of lectures delivered before the Institute of Bankers, and this, coupled with the fact that the author is the Chief Land Registrar, makes it an authoritative introduction for the student, in which the general principles are lucidly explained. The beginner will be in no doubt as to the advantages of registered over unregistered conveyancing after reading the first chapter. The book deals with the keynote features of registration of title, its history, certain special features—such as, overriding interests, general boundaries of registered land—rectification of register and indemnity, official searches, relation of land registration to maps and plans, and the Land Charges Registry. There is an appendix of forms, and a table showing the minimum saving of costs through registration.

Cases Illustrating General Principles of the Law of Contract.

Second edition. By Sir JOHN MILES, Kt., Warden of Merton Hall, Oxford, Barrister-at-Law, and J. L. BRIERLY, Fellow of All Souls College, Oxford, Barrister-at-Law. Oxford: At the University Press. 1937. xvi and 474 pp. (21s.) (With *Anson's Contract*, 33s.)

THE purpose and plan are those of the first edition—a collection of some of the cases referred to in *Anson on Contract*. In every case, at least one of the judgments is reproduced in full, the facts are given and usually the arguments of counsel, while short extracts from judgments are prefixed to the cases. The order of the headings is changed, 'Limits of Contractual Obligation' is new, and the heading Married Women and the cases thereunder are omitted. Twenty of the older cases have been omitted, and twelve new cases inserted of which eight were decided since the first edition was published. There is no index to this edition.

Harris' Hints on Advocacy. Seventeenth edition. By the late RICHARD HARRIS, K.C., with an Introduction by His Honour Sir EDWARD PARRY. London: Stevens & Sons, Ltd. 1937. xviii and 348 pp. (10s.)

THE fact that this book has run to seventeen editions since 1879 is adequate proof of its merits and well-deserved popularity. The Introduction written by that master, Sir Edward Parry, is new. As a student he found the book of real service, and he heartily commends it: 'It should be read carefully and intelligently by anyone who aspires to the art of advocacy.' Here the beginner can learn the tools and tricks of the craft so as to display eloquence, wit, and judgment in his art. Sir Edward advises the beginner to sit in Court and listen to trials and to master the rules of evidence. Every page has useful hints and humorous comment; the illustrations are apt and illuminating, and the book makes enjoyable and instructive reading.

How to Become a Barrister. By GIBSON and WELDON. Sixth edition. London: 'Law Notes' Publishing Offices. 1937. 59 pp. (2s. 6d.)

THIS is a very useful guide to the regulations for admission and call to the Bar, incorporating the important changes made since the Trinity Examination, 1937. The restrictions, qualifications and exemptions from examination are all dealt with; suggestions are made as to books to read and a list of studentships and prizes is set out.

Burnett's Elements of Conveyancing (with Precedents). Being a sixth edition of *Deane and Burnett's Elements of Conveyancing*. By J. F. R. BURNETT, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. xxxii and 501 pp. (21s. net.)

THIS work is now quite properly attributed to the real author as, on undertaking the previous edition, he effected a complete and necessary metamorphosis of the previous work which had been going through a process of gradual transformation in the hands of a succession of editors. It is now a thoroughly up-to-date and reliable introduction to conveyancing practice and can with confidence be recommended to students desiring a practical supplement to their studies in property law. The chapter on Registration of Title together with the Forms and Precedents in Part IV will be particularly welcome to students.

D. T. O.

The Students' Conflict of Laws. Being an Introduction to the Study of Private International Law, based on Dicey. By E. LESLIE BURGIN, LL.D.(Lond.), and ERIC G. M. FLETCHER, LL.D., B.A.(Lond.). Third edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1937. xvi and 347 pp. (20s.)

THE new edition has been revised and brought up to date with the care and accuracy which is guaranteed by the names of the authors. One small matter of regret, however, is that they have not thought it necessary to rewrite the whole of the note on *Renvoi* (Article 116). *Bartlett v. Bartlett* [1925] A. C. 377, which is stated to be 'a very instructive example of *renvoi*', really has nothing to do with the doctrine, except perhaps by way of more or less remote analogy.

D. T. O.

The Law of Partnership. By Sir FREDERICK POLLOCK, Bart., K.C., D.C.L. Thirteenth edition. London: Stevens & Sons, Ltd. 1937. xxvii and 269 pp. (10s. net.)

It would be impertinent to offer a commendatory review of this book which was first written sixty years ago, formed the basis of the Partnership Act of 1890 and has in a regular series of editions held its position in the front rank of concise textbooks on any subject ever since. The death of the distinguished author occurred after he had prepared this edition but before he was able to write a preface for it. There have been no changes of note in the Law of Partnership in recent years, and therefore the present volume is almost word for word the same as the last. No further alteration would be desired by those who have profited by the study of the book in the past.

J. W. C. T.

An Epitome of the Ninth Edition of Salmond on Torts. By J. GLYN BURRELL, LL.B., of the Inner Temple and Northern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1937. 8vo. vii and 244 pp. (8s. net.)

UNLIKE Sir John Salmond's own Summary of his work, this humble little book makes no effort to stand on its own feet. There are no indices or references to reports, and in some places the mode of statement is too condensed to be readily intelligible without reference to the parent work. Used purely as a companion volume, however, it should be of assistance to beginners. On the whole the Epitome follows its original with reasonable fidelity, although at p. 42 there is a slight misunderstanding of a reference to *Hern v. Nichols*, and at p. 57 the expression 'physical consequences' in Salmond is changed to 'actual consequences'.

G. L. W.

Other books and publications received (some of these will be reviewed in the next issue):—

L'Islande, son Statut à travers les ages. Par AAGE GREGERSEN. Paris: Sirey. 1937. 462 pp. A legal history of Iceland with special reference to the development of Icelandic constitutional law. It is an exhaustive study which fills a serious gap, being the first comprehensive treatise on the subject to be published in French.

Die tschechoslowakischen Denkschriften für die Friedenskonferenz von Paris, 1919/1920. Übersetzt und mit einer Einleitung herausgegeben von H. RASCHHOFER. Heft 24 der Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. Berlin: Carl Heymanns Verlag. 1937. 362 pp. (RM. 13.) A compilation and translation into German of the memoranda submitted to the Peace Conference by the Czechoslovakian Delegation, with an introduction by the editor. The book offers valuable information on the history, and social, economic and political structure of Czechoslovakia, and also throws some light upon the aims and ideas of the founders of this State.

Recueil des Accords Intellectuels. Published by the International Institute of Intellectual Co-operation. Paris: 2 Rue de Montpensier, Palais Royal. 1938. 238 pp. (9s.) This is a collection of treaties for the furtherance of intellectual relations (artistic, literary, scientific and educational); treaties dealing with this topic from a political, economic or social point of view are excluded.

Die Lehre vom 'Contempt of Court' in rechtsvergleichender Betrachtung. Von DR. MICHELE GAETANO DE ROSSI. Reprinted from the 'Zeitschrift für vergleichende Rechtswissenschaft'. Verlag Ferdinand Enke, Stuttgart. 1937. 15 pp. This is a short summary by the author of his book 'Il Contempt of Court e la Specific Performance nel diritto inglese', Rome, 1934. Reference may be made to this and to the reviews in: 51 (1935) L. Q. R. 556; XVIII (1936) 3. ser. Journ. of Comp. Legisl. 174; 1935 (9) Zeitschrift für ausländisches und internationales Privatrecht 802.

Die neue Strafgesetzgebung Rumäniens, systematisch dargestellt in deutscher Sprache. Von DR. LOUIS HAUSKNECHT. 2. Aufl. 1938. Cernauti. 30 pp. (40 Lei.)

Der Solidarismus, oder die Doktrin der sozialen Solidarität. Von DR. LOUIS HAUSKNECHT. 2. Aufl. 1938. Cernauti. 62 pp. (50 Lei.)

Annuaire de l'Association Yougoslave de droit international. Vol. 3. Belgrade-Paris: Les Éditions Internationales. 1937. This volume contains articles on international collaboration, history of diplomacy and international law. A valuable bibliography of recent legal publications in Great Britain, France, Germany and Italy dealing with Yugoslavia is appended, in addition to an exhaustive bibliography of books and articles on Public and Private International Law published in Yugoslavia between 1930 and 1936.

The New Commonwealth Quarterly. Vol. III, Nos. 2 and 3 (Sept.; Dec. 1937). London: Constable & Co. (2s.) Containing contributions on international relations, international law and world politics with special reference to international justice and security. The following articles are of interest to us: MITRANY: The U.S.A. Neutrality Act of May 1, 1937; VERDROSS: Minderheitenrecht und Volksgruppenrecht; No. 3, EAGLETON: The U.S.A. and the Far-Eastern War; LYTTON: The lessons of the League of Nations Commission of Enquiry in Manchuria.

The Arbitration Journal. Vol. II, No. 1 (Jan. 1938). Published by the American Arbitration Association in collaboration with the Chamber of Commerce of the State of New York and the Inter-American Arbitration Commission. New York: 8 W.40th Street. London: Stevens & Sons, Ltd. (\$2.50 p.a.)

Chicago Bar Record. Vol. 19, Nos. 2 and 3 (Dec. 1937; Jan. 1938). Published by the Chicago Bar Association. Chicago, Ill.: 29 La Salle Street.

World Trade. Journal of the International Chamber of Commerce. Vol. 9, No. 7/8 (July-August 1937). Paris (8): 38 Cours Albert 1^{er}. (40 fr. frs. p.a.)

Resolutions adopted by the Ninth Congress of the International Chamber of Commerce. Brochure No. 98. Supplement to 'World Trade' (July 1937). Ed. by the International Chamber of Commerce. Paris (8): 38 Cours Albert 1^{er}.

The Rotarian. Published by the Rotary International. Chicago: 35 E. Wacker Dr. Vol. 51, No. 4 (Oct. 1937): Broadcast Trials?—Yes, by MITCHELL DAWSON—No, by ROBERT BERNAYS. Vol. 52, No. 1 (Jan. 1938): One-House Legislation?—Yes, by GEORGE W. NORRIS—No, by ARTHUR MEIGHEN.

Revista de Derecho y Ciencias Politicas, organo de la Facultad de Derecho y Ciencias Politicas de la Universidad Mayor de san Marcos. Director: DR. PEDRO M. OLIVEIRA. Vol. II, No. 1. Lima 1937. Seminario de la Facultad de Derecho y Ciencias Politicas. Casilla No. (524) Lima, Peru.

Res Judicatae. The Magazine of the Law Students' Society of Victoria. Vol. I, Nos. 1, 2, 3. 1935—1937. Melbourne: Law Book Company of Australasia, Ltd. (2s. per number.) We welcome this new publication, and add that we have enjoyed reading the leading articles on topics connected with Contract and Tort; they set a high standard, and may the work flourish. The articles are contributed by members of the teaching staff of Melbourne University, graduates and students. There are useful notes on recent cases and book reviews.

King's Counsel. Organ of the Faculty of Laws Society of King's College, London. March 1938. Leominster: Orphans' Printing Press, Ltd.

Pilgrimage of Grace. By WILLIAM BLISS. London: Witherby, Ltd. 1937. 213 pp. (8s. 6d.)

An Introduction to Equity. By GEORGE W. KEETON. London: Sir Isaac Pitman & Sons, Ltd. 1938. xxx and 242 pp. (17s. 6d.)

Payne's Carriage of Goods by Sea. Fourth edition. By JOHN SAMUEL. London: Butterworth & Co., Ltd. 1938. xxiv and 157 pp. (8s. 6d.)

The Administration of Justice under the Quebec Act. By HILDA M. NEATBY. London: Oxford University Press. 1937. v and 383 pp. (27s.)

Willis's Workmen's Compensation Acts, 1925—1934. Thirty-first edition. London: Butterworth & Co., Ltd. 1938. cxlvii and 1018 pp. (20s.)

Law Reports of Palestine, 1934-35. Selected and edited by SIR MICHAEL McDONNELL. London: Waterlow & Sons, Ltd. 1937. xx and 505 pp.

Principles of Company Law. Second edition. By J. CHARLESWORTH. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1938. xlviii and 320 pp. (7s. 6d.)

The World Crisis. By Professors of the Graduate Institute of International Studies. London: Longmans, Green & Co., Ltd. 1938. xii and 382 pp. (10s. 6d.)

The Domesday of Crown Lands. By SIDNEY J. MADGE. London: Geo. Routledge & Sons, Ltd. 1938. xvii and 499 pp. (25s.)

Tulane Law Review. Vol. XII. Nos. 1 and 2. December, 1937, and February, 1938. Leading articles of interest to us are: 'The Passing of the School of Montesquieu and Its System of Separation of Powers', by MITCHELL FRANKLIN; 'Fright or Nervous Shock as a Basis for the Recovery of Damages'. (\$4.50.)